DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(10)

• 85-1417-CFX
atus: GRANTED

Title: City of Springfield, Massachusetts, Petitioner
v.
Lois Thurston Kibbe, Administratrix of Estate of Clinton Thurston

cketed:
nuary 17, 1986

Court: United States Court of Appeals for the First Circuit

Counsel for petitioner: Flanagan, William C., Pikula, Edward M.

Counsel for respondent: Nagel, Terry Scott

try	Date	Note	Proceedings and Orders
1	Jan 17 1986	G	Petition for writ of certiorari filed.
2	Feb 19 1986		DISTRIBUTED. March 7, 1986
3	Feb 21 1986	X	Brief of respondent Lois T. Kibbe, etc. in opposition filed.
4	Mar 10 1986		retition GRANTED. Justice Brennan OUT.
			**********
5	Mar 24 1986		Order extending time to file brief of petitioner on the merits until May 15, 1986.
7	Apr 4 1986	G	Motion of respondent for leave to proceed further herein in forma pauperis filed.
8	Apr 10 1986		Record filed.
9	Apr 10 1986		Certified copy of original record and proceedings received. (Box).
10	Apr 21 1986		Motion of respondent for leave to proceed further herein in forma pauperis GRANTED.
11	May 15 1986		Brief amicus curiae of U.S. Conference of Mayors, et al. filed.
12	May 15 1986		Joint appendix filed.
13	May 15 1986		Brief of petitioner Springfield, Massachusetts filed.
15	May 23 1986		Order extending time to file brief of respondent on the merits until July 15, 1986.
16	Jun 16 1986		Order further extending time to file brief of respondent on the merits until August 1, 1986.
17	Aug 1 1986		Brief amicus curiae of ACLU, et al. filed.
18	Aug 1 1986		Brief amicus curiae of NAACP filed.
19	Aug 11 1986		Brief of respondent Lois T. Kibbe, etc. filed.
20	Aug 26 1986		CIRCULATED.
21	Sep 3 1986		SET FOR ARGUMENT. Tuesday, November 4, 1986. (1st case) (1 hour)
22	Oct 25 1986	X	Reply brief of petitioner Springfield, MA filed.
25	Nov 4 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-1217

Supreme Court, U.S.
FILED
JAN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

CITY OF SPRINGFIELD, MASSACHUSETTS,
PETITIONER,

v.

LOIS THURSTON KIBBE,
ADMINISTRATRIX OF THE ESTATE OF CLINTON THURSTON,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

WILLIAM C. FLANAGAN,
Counsel of Record,
RICHARD T. EGAN,
City Solicitor,
HARRY P. CARROLL,
Deputy City Solicitor,
EDWARD M. PIKULA,
Assistant City Solicitor,
Law Department,
City of Springfield,
36 Court Street,
Springfield, Massachusetts 01103.
(413) 787-6085

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

I. Whether inadequate training of police officers is a viable theory of municipal liability under 42 U.S.C. § 1983.

II. Whether the "single incident" rule of *City of Oklahoma City* v. *Tuttle*, 105 S. Ct. 2427 (1985), is limited in application to one act by one officer.

III. Whether a policy of inadequate training may be inferred from the conduct of several police officers during a single incident without evidence of prior misconduct in the department, without a conscious decision by policymakers, and without proof that recognized standards of police training were violated.

Table of Contents.

Opinion below	2
Jurisdiction	2
Statutory provision	2
Statement of the case	3
Reasons for granting the writ	7
I. The decision below raises significant and recurring problems concerning the standard by which municipal liability may be imposed under 42 U.S.C. § 1983	8
II. The decision below conflicts with the decision of this Court as to the proper application of 42 U.S.C. § 1983 with regard to municipal liability	10
III. The decision below conflicts with the decisions of other Courts of Appeals as to the proper application of 42 U.S.C. § 1983 with regard to municipal liability	13
Conclusion	16
Appendices	follows page 16

Table of Authorities Cited.

CASES.

City of Oklahoma City v. Tuttle, 105 S.Ct. 2427 (1985)	6, 7, 9, 10, 11 et seq.
Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984)	14
Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985)	9,10

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 10
McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979) 14
Monell v. Department of Social Services, 436 U.S. 658 (1978) 6, 7, 8, 9, 10 et seq.
Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979) 14
Pembaur v. City of Cincinnati, 746 F.2d 337 (6th Cir. 1984) 8, 14, 15
Polk County v. Dodson, 454 U.S. 312 (1981) 9
Vippolis v. Village of Haverstraw, 768 F.2d 40 (2d Cir. 1985) 15

STATUTES.

28 U.S.C. § 1254(1) 2
42 U.S.C. § 1983 2, 7, 8, 9, 10 et seq.
Massachusetts General Laws
c. 209A, § 3 3
c. 209A, § 6 3

No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

CITY OF SPRINGFIELD, MASSACHUSETTS,
PETITIONER,

v.

LOIS THURSTON KIBBE,
ADMINISTRATRIX OF THE ESTATE OF CLINTON THURSTON,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner City of Springfield, Massachusetts, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in these proceedings on November 27, 1985.

Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit, not yet reported, appears in the Appendix hereto (App. 1a). The judgment, memorandum and order entered by the District Court for the Western District of Massachusetts on the motions for judgment notwithstanding the verdict are also attached.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on November 27, 1985 (App. 22a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provision.

42 U.S.C. § 1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case.

The City of Springfield is a municipal corporation located in Hampden County, Massachusetts. Theodore Perry, a Springfield police officer, shot and killed Clinton Thurston during an automobile chase through the City of Springfield.

At approximately 6:30 P.M. on September 29, 1981, the Springfield Police Department received an emergency call from Dorothy Gilbert, who reported a violation of a restraining order. The restraining order was issued under G.L. c. 209(A), §§ 3, 6, to protect Pamela Etter from abuse by Clinton Thurston. A cruiser was dispatched to investigate. Ms. Gilbert called the department a second time and stated that Thurston had threatened the occupants of her apartment with a knife. A second cruiser was sent to investigate. At about 8:15, a third telephone call was received stating that Thurston was breaking down the door. The dispatcher sent police to the scene once again. Within two minutes of that call, a fourth telephone call reported that Thurston was assaulting Ms. Etter at that very minute.

Police officers responding to the final call discovered that Thurston abducted Ms. Etter, forcing her to leave the premises with him in his automobile. Shortly thereafter, Office Risch spotted the Thurston vehicle. Risch activated the flashing headlights, portable blue light and siren of his unmarked cruiser, and initiated pursuit.

Thurston stopped at an intersection. Risch approached him and identified himself as a police officer. Thurston drove off from the curb, through a red light, and into the path of oncoming traffic.

Risch, joined by other cruisers, continued to pursue Thurston at speeds ranging between 40-45 m.p.h. Risch frequently radioed his location and speed to the police dispatcher. As the chase continued, Officers Troy, Kupras and Daigneau attempted to set

up an intercept point at an intersection within the probable route of the Thurston vehicle.

As Thurston approached the three officers, he accelerated towards Officers Daigneau and Troy. Thurston narrowly missed Troy, who fired his weapon at the rear tire of the vehicle as it passed him, hitting the rim of the wheel. Risch reported Thurston's attempt to run down a police officer over his radio.

At the next intersection, Officers Schaub and Perry stationed themselves for a second attempt to intercept Thurston. Schaub's vehicle was placed across the right lane. Schaub stood in the middle lane attempting to flag down Thurston. The left lane was open. Thurston swerved his vehicle at Schaub, who dived out of its path to avoid being hit. Schaub drew his revolver and fired at the fleeing Thurston vehicle.

Captain Spellacy at Police Headquarters radioed instructions that motorcycles should stay out of the pursuit. Officer Perry did not hear these instructions. Perry observed Thurston's action at this intersection and joined the pursuit on his motorcycle, along with several officers in cruisers. Perry accelerated his motorcycle past the cruisers and pulled up to the left rear of Thurston's vehicle ordering Thurston to pull over. Thurston did not stop. He swerved his car into Perry's path of travel three times in an attempt to knock Perry off his motorcycle. Perry fired his weapon after the second and third swerves. The second shot, hit Thurston in the back of the head, at which point the vehicle slowed down and eventually stopped.

At this time, no one realized Thurston had been shot and most probably was unconscious. Thurston's hands remained on the wheel and he faced straight ahead in a seated upright position. Risch exited his vehicle, approached Thurston and ordered him out of the car. In apparent response, Thurston's

vehicle lurched forward striking the cruiser blocking its path, whereupon Officer Risch struck Thurston in the back of the head with his flashlight. Simultaneously, Risch and other police officers pulled Thurston from his vehicle and handcuffed him facedown in the road.

Sargeant Thomas Rondeau, observing blood coming from Thurston's head, ordered Officer Reigner to transport Thurston to the hospital. Thurston was taken from the scene immediately and arrived at the hospital within 5-6 minutes. After some initial confusion, hospital personnel determined that Thurston had been shot. Thurston died at 9:24 P.M.

Officers Troy, Schaub and Perry, the three officers who had fired shots during the incident, submitted their revolvers to their superior officer. Ballistic reports indicated that the bullet which struck Thurston had come from Officer Perry's weapon.

On August 10, 1982, plaintiff, in her capacity as Administratrix of Thurston's estate, filed this action against ten police officers and the City of Springfield, alleging negligent or intentional deprivation of civil rights by the individual officers and negligent training or supervision by the City. At trial, plaintiff voluntarily dismissed claims against all defendants with the exception of the City of Springfield and four Springfield police officers; Theodore Perry, Kenneth Schaub, John Troy and Eric Risch. At the close of plaintiff's case, motions for directed verdicts were denied.

The jury returned a verdict for plaintiff on her civil rights claim against Officer Perry, awarding One Dollar ($1.00) in compensatory damages and Five Hundred Dollars ($500.00) in punitive damages. On the civil rights claim against the City, the jury awarded compensatory damages in the amount of Fifty Thousand Dollars ($50,000). The jury found for defendants on all other claims. By special verdicts, the jury specifically found that Officers Schaub, Troy and Risch had not violated Thurston's civil rights.

Judgment was entered in accordance with these verdicts on November 23, 1984. The City and Officer Perry filed motions for judgment notwithstanding the verdict on November 29, 1984, to which plaintiff submitted an opposition. After hearing, the trial court denied both motions and ordered new trials on the grounds of inconsistent verdicts.

Upon plaintiff's motion, after hearing, the judge reconsidered his previous order and reinstated the judgment on the original verdicts. Both defendants filed separate notices of appeal on January 19, 1985 and the appeals were consolidated. Subsequently, Officer Perry withdrew his appeal.

On appeal, the First Circuit addressed the following issues: whether inadequate training could ever meet the standards of municipal liability under *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978); whether the event in question was a "single incident" under *City of Oklahoma City* v. *Tuttle*, 105 S.Ct. 2427 (1985), thereby proscribing liability; whether a "policy" of inadequate training may be inferred from the conduct of several police officers without evidence of prior misconduct, without decisions by municipal policymakers without proof that recognized standards of police training were violated; and whether the jury instructions properly conveyed the burden placed on the plaintiff to establish municipal liability.

The Court of Appeals approved imposition of liability on the basis of a policy of inadequate training, stating:

> Four members of the Supreme Court recently have raised doubts as to whether a harm allegedly caused by a policy of gross negligence in police training could meet § 1983's standard of causation. *Tuttle*, 105 S. Ct. at 2436 n.7. We, however, continue to believe this is a viable theory of municipal liability

> because we conclude that it is possible to show "an affirmative link", *Tuttle*, 105 S. Ct. at 2436, between a policy of inadequate training and resort to harmful police methods.

(App. 6a-7a).

In "an admittedly close case," *id.* the Court of Appeals found that Thurston's death was not a single incident because it "involved many officers and a series of exchanges between police officers and civilians," thereby distinguishing *Tuttle*. *Id.* at 12a.

Despite "sparse" evidence on the City's training practices, the Court of Appeals said that the jury could infer "gross negligence in training" *id.* at 12a from the officers' actions during the incident.

Finally, the Court of Appeals found that "while the district court's instructions could have been better, they were not defective" because they did not allow "liability based solely on the incident in which Thurston was harmed. . . ." *Id.* at 20a.

Reasons for Granting the Writ.

This case presents important issues of municipal liability under 42 U.S.C. § 1983, which this Court expressly reserved for future consideration in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), and *City of Oklahoma City* v. *Tuttle*, 105 S.Ct. 2427 (1985). The standard for imposing liability on a municipality under § 1983 for alleged inadequacies in training or supervision of police officers has been

and continues to be highly ambiguous, creating a floo(of litigation in the lower federal courts. This case provides an opportunity for the Court to clear up confusion in the lower courts over the exact limits of municipal liability under § 1983 for failure to train or supervise local police forces.

Additionally, this Court recently granted the petition for a writ of certiorari and heard arguments in the matter of the Sixth Circuit decision in *Pembaur* v. *City of Cincinnati*, 746 F.2d 337 (6th Cir. 1984), No. 84-1160. *Pembaur* involves some issues similar to those presented in this case. A decision in *Pembaur* may permit this Court to vacate the judgment herein and remand this case for reconsideration. However, if these issues are not addressed in *Pembaur*, this case provides an opportunity for the Court to give needed clarification of the standards of municipal liability under 42 U.S.C. § 1983.

Finally, the writ should be granted because the decision of the First Circuit Court of Appeals conflicts with decisions of other Circuits as to the proper standard of municipal liability under 42 U.S.C. § 1983.

I. The Decision below Raises Significant and Recurring Problems Concerning the Standard by which Municipal Liability May Be Imposed under 42 U.S.C. § 1983.

In virtually every complaint alleging police misconduct under § 1983, it has become a matter of course for plaintiffs to name the municipality as a defendant in order to reach the perceived "deep pocket" of the municipal taxpayer. The majority of these claims assert the nebulous theory of inadequate training as a basis of municipal liability rather than an explicit policy which caused a constitutional deprivation. In order to assure that public employers will not become absolute insurers against police misconduct, this Court in *Monell*

established an absolute prohibition against theories of liability akin to *respondeat superior*. 436 U.S. at 691. Rather, a governmental policy or custom must be the "'moving force of the constitutional violation'" before liability can be imposed on a municipality. *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981) (quoting *Monell*, 436 U.S. at 694).

This Court in *Tuttle* expressed doubts as to whether inadequate training can ever be a policy or custom under *Monell*. 105 S. Ct. at 2436 n.7. However, a trend in the lower courts permits municipal liability based on inadequate training. This trend undermines the standard of liability established by *Monell* and its progeny. Without further definition of this standard, lower courts will continue to expand municipal liability, further eroding the protections afforded municipal taxpayers by the policy or custom requirement of *Monell*.

One "'small but necessary step' toward defining the full contours of municipal liability pursuant to § 1983" was taken in *Tuttle*, 105 S. Ct. at 2429; *id* at 2437 (Brennan, J., concurring). This Court held that absent a written or official unconstitutional municipal policy, "proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* . . . ." *Id*. at 2436. In the short time since *Tuttle*, the First Circuit in the instant case and at least one other Circuit have created an exception to the single incident. Specifically, the First Circuit found that this case was "not the sort of 'single incident' that the Supreme Court addressed in its opinion in *Tuttle*," because *Tuttle* involved only one officer and one shot (App. 10a). The Fifth Circuit adopted a similar narrow definition of the single incident rule in *Grandstaff* v. *City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), by disecting a single incident into "repeated acts of abuse on this night, by several officers in several episodes."

These lower court precedents will result in all § 1983 actions against a municipality going to a jury by a mere allegation that

more than one police officer was involved. It will not be difficult for ingenious plaintiff's counsel to create issues of material fact as to whether a municipal policy of inadequate training can be inferred from the conduct of the police officers. It will be virtually impossible for courts to dispose of any claim against a municipality by summary judgment or directed verdict. This will endanger the financial integrity of all governmental entities which employ police, not only by the threat of judgments but by the costs of defending litigation. Similar concerns prompted this Court to adopt an objective rather than subjective standard for qualified immunity under § 1983. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817 n.29 (1982).

The Court needs to provide guidance on the important and recurring questions concerning the imposition of municipal liability based on inadequate training of police officers. These questions include: whether a policy of inadequate training is a viable theory of liability; whether a single incident includes only one act by one officer; and whether the existence of a policy of inadequate training may ever be inferred without evidence of prior misconduct, without a conscious decision by policymakers, and without proof that recognized standards of police training were violated. Such questions have not been addressed by this Court and should be resolved to prevent lower courts from rendering the protections afforded municipalities by *Monell* and *Tuttle* entirely ineffective.

II. The Decision below Conflicts with the Decision of this Court as to the Proper Application of 42 U.S.C. § 1983 with Regard to Municipal Liability.

The decision in the instant case directly conflicts with *Monell* and *Tuttle* in two ways. First, the decision has intepreted the "single incident" rule of *Tuttle* to apply only where one police officer fires one shot. As previously noted, plaintiffs will be

able to reach the jury on virtually every claim against a municipality based on inadequate training by merely alleging the involvement of more than one officer, without any proof of prior misconduct on the part of the police. A "one officer, one shot" interpretation of the single incident rule does not afford municipal decisionmakers any opportunity to control or respond to claimed inadequacies in training which allegedly caused a constitutional deprivation. This result is in direct conflict with both *Tuttle* and *Monell*, which prohibit municipal liability under circumstances where no wrong can be attributed to municipal decisionmakers. *Tuttle*, 105 S.Ct. at 2435.

The lower court focused on the number of police officers involved in the incident to impose municipal liability despite the jury's special verdicts that, other than Perry, no officers violated Thurston's civil rights. The lower court decision presents a direct conflict with the rule of *Tuttle* that a custom or policy of inadequate training may not be inferred from a single incident.

Second, the Court of Appeals inferred a policy of inadequate training from factors which lack the required "affirmative link" to the alleged deprivation. *Id.* at 2436. Where a plaintiff relies on a "thoroughly nebulous" municipal policy such as inadequate training, "*considerably more proof than the single incident* will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy' and the constitutional deprivation." *Id.* (footnotes omitted) (emphasis added).

The Court of Appeals created an inference of a municipal policy of inadequate training of police officers by relying on the following factors:

> (1) testimony that there was but little guidance for undertaking an automobile chase; (2) testimony, contrary to that of the officers, that Thurston was not posing a life-threatening hazard to them; (3) a depart-

> ment rule on the use of firearms which in part required preliminary resort to less severe alternatives, arguably ignored by the officers; (4) another part of the rule which proscribed firing where there was substantial danger to innocent people, arguably violated by the two officers; (5) a dispatcher's arguably overzealous announcement on police radio; and (6) evidence of looseness in investigating shootings.

(App. 6a).

The first factor refers to testimony that officers were trained to avoid the use of roadblocks. The officers were instructed to utilize lights, sirens, stand in the road and motion the suspect to stop. There was no evidence that such training deviated from any recognized standard of care for police department training. Reliance on this factor, therefore, conflicts with *Tuttle's* requirement of separate proof of an existing unconstitutional policy and its origin. *Id.* at 2436. Further, in a classic example of *post hoc ergo propter hoc* reasoning the Court's discussion of the first factor implies that Thurston was shot by Perry because other police were unsuccessful in stopping him at two road blocks.

The second, third and fourth factors, considered in light of the special verdicts, are nothing more than reliance on a single alleged use of excessive force. Further, the Court itself noted that factors (5) and (6) do not evidence a municipal policy of inadequate training, but rather municipal policies of the excessive use of deadly force and the employment of inadequate investigation procedures (App. 17a). "On their own, these other policies were not proven sufficiently or linked sufficiently with the harm to impose municipal liability." *Id.*

If a policy of inadequate training is a viable theory of municipal liability, plaintiff must sustain the burden of proof of such a policy. The "considerably more proof than the single incident," required under *Tuttle*, 105 S.Ct. at 2436, should have included at the very least some evidence of recognized and acceptable standards of training in the use of deadly force, evidence of gross deviations from such standards, and evidence that these deviations caused the alleged deprivation of Thurston's civil rights. The factors relied upon by the lower court do not come close to this evidentiary showing. As such, they directly conflict with the holdings in both *Tuttle* and *Monell*, which require that the municipality cause the deprivation. *Tuttle*, 105 S.Ct. at 2436, *Monell*, 436 U.S. at 694.

The Court of Appeals inferred a municipal policy of inadequate training from the conduct of police officers on the street without any involvement of supervisory officials to whom a policy decision could be attributed. This, in effect, substitutes *res ipsa loquitor* for *respondeat superior*, a theory expressly rejected as a basis for municipal liability in *Monell*. *See Tuttle*, 105 S.Ct. at 2550 n.6 (Brennan, J., concurring). The lower court's interpretation of the evidentiary requirements of *Monell* and *Tuttle* presents a direct conflict with the rulings of this Court.

III. The Decision below Conflicts with the Decisions of other Courts of Appeals as to the Proper Application of 42 U.S.C. § 1983 with Regard to Municipal Liability.

The decision of the First Circuit in the instant case directly conflicts with those of other Circuits as to the definition of a single incident. Prior to *Tuttle*, there was no apparent dispute among the Circuits as to what constituted a single incident.

However, by holding that a single incident is limited to only one act by one officer, the post-*Tuttle* decisions of the First Circuit in the instant case and the Fifth Circuit in *Grandstaff*, 767 F.2d 161, created a conflict with the pre-*Tuttle* decisions of other Circuits with respect to the definition of a single incident.

In several cases preceding *Tuttle*, the Circuit Courts of Appeal found conduct by more than one police officer to be a single incident. For example, in *Gilmere* v. *City of Atlanta*, 737 F.2d 894 (11th Cir. 1984), plaintiff's decedent was shot after an altercation with two city police officers. The Eleventh Circuit held this was "an isolated incident." *Id*. at 904. Similarly, in *McClelland* v. *Facteau*, 610 F.2d 693, 695 (10th Cir. 1979), plaintiff alleged several constitutional violations by two state police officers and a jail guard. The Tenth Circuit referred to these violations as "an isolated occasion." *Id* at 697. Finally, in *Owens* v. *Haas*, 601 F.2d 1242, 1245 (2d Cir. 1979), the Second Circuit called the severe beating of plaintiff by approximately seven prison officials "a single brutal incident." *Id*. at 1246.

The holdings of the First and Fifth Circuits, that an incident involving more than one police officer is not a single incident are directly contrary to the decisions of the Eleventh, Tenth and Second Circuits in *Gilmere*, *McClelland* and *Haas*. The First and Fifth Circuits have attempted to avoid the rule of *Tuttle* by a very narrow interpretation of what constitutes a single incident. The newly created conflict as to the definition of a single incident must be addressed by this Court in order to carry out its decision in *Tuttle*.

Another situation involving more than one officer which a court held to be a single incident is *Pembaur* v. *City of Cincinnati*, 746 F.2d 337 (6th Cir. 1984), in which the Court granted certiorari and recently heard argument, No. 84-1160. In that case, the Sixth Circuit referred to the forced entry into a physician's office by several county and municipal employees, as being "one occasion," and refused to impose liability on the county. *Id*. at 341. If the *Pembaur* decision does not resolve the conflict among the Courts of Appeals as to what constitutes a single incident, this Court should take the opportunity to do so in the instant case.

In addition to the conflict among the Circuits as to the definition of a single incident, a second conflict is created by the First Circuit's inference of a policy of inadequate training from the above-mentioned factors. This inference is directly contrary to the Second Circuit's decision in *Vippolis* v. *Village of Haverstraw*, 768 F.2d 40 (2d Cir. 1985). In that case, plaintiff claimed a series of constitutional deprivations had been caused by the inadequate training of a police officer. The officer received on-the-job training rather than the standard required training program. *Id* at 42. The Second Circuit found plaintiff failed to link his injuries with a municipal policy of inadequate training as he had not shown that "specific deficiences in the training given police officers led the misbehaving officer to engage in the alleged misconduct." *Id*. at 45.

As previously noted, the factors relied on by the Court of Appeals in the instant case do not include evidence of any specific deficiencies in the training of police officers which caused the shooting of Thurston. The First Circuit upheld a finding of gross negligence in training absent the causal evidence required by the Second Circuit in *Vippolis*. This conflict between the First and Second Circuits should be resolved by this Court.

These conflicts justify the grant of certiorari to review the judgment below.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

WILLIAM C. FLANAGAN,
Counsel of Record,
RICHARD T. EGAN,
City Solicitor,
HARRY P. CARROLL,
Deputy City Solicitor,
EDWARD M. PIKULA,
Assistant City Solicitor,
Law Department,
City of Springfield,
36 Court Street,
Springfield, Massachusetts 01103.
(413) 787-6085

Table of Contents.

Appendix A — Opinion of the United States Court of Appeals for the First Circuit, dated November 27, 1985 1a

Appendix B — Judgment of the United States Court of Appeals for the First Circuit, dated November 27, 1985 22a

Appendix C — Memorandum and order of the United States District Court for the District of Massachusetts, dated December 21, 1984 23a

Appendix D — Judgment in a civil case, United States District Court for the District of Massachusetts 28a

Appendix E — Annotated Laws of Massachusetts
c. 209A, § 3
c. 209A, § 6

Appendix A.

United States Court of Appeals
For the First Circuit

No. 85-1078

LOIS THURSTON KIBBE, Administrator of the
Estate of CLINTON THURSTON,
Plaintiff, Appellee

v.

CITY OF SPRINGFIELD,
Defendant, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Frank H. Freedman, *U.S. District Judge*]

Before
Coffin, *Circuit Judge*,
Wisdom* and Aldrich, *Senior Circuit Judges*.

Edward M. Pikula, Assistant City Solicitor, with whom *Richard T. Egan*, City Solicitor, *Harry P. Carroll*, Deputy City Solicitor, were on brief for appellant.
Terry Scott Nagel on brief for appellee.

November 27, 1985

---

*Of the Fifth Circuit, sitting by designation.

COFFIN, *Circuit Judge*. Appellee Lois Thurston Kibbe, administratrix of the estate of Clinton Thurston, filed this suit under 42 U.S.C. § 1983 alleging that appellant City of Springfield and a number of its police officers deprived Thurston of his civil rights in a motor vehicle pursuit that ended with a police officer shooting Thurston in the head, causing his death. The jury returned verdicts against the police officer who fired the fatal shot and against the City, but found for three other officers.[1] It awarded one dollar in compensatory damages and five hundred dollars in punitive damages against the officer and compensatory damages in the amount of fifty thousand dollars against the City. Appellant challenges the district court's refusal to grant either a directed verdict or judgment notwithstanding the verdict, and also claims error in the jury charge.[2] For reasons we discuss below, we affirm.

---

[1] Appellee originally named ten Springfield police officers in her civil rights claim and also asserted pendent state claims for conscious suffering and wrongful death. At trial, she voluntarily dismissed claims against all but the City and four officers. Also at trial, the court directed verdicts in favor of the City and three officers on the conscious suffering and wrongful death claims as well as on counts for conspiracy under 42 U.S.C. § 1985. The jury found for the fourth police officer on a wrongful death claim.

[2] The district court initially ordered new trials for the City and the police officer on the ground of inconsistent verdicts. The court pointed to the discrepancy in the amounts of compensatory damages awarded against the City and the officer, and it also questioned an assessment of punitive damages against the officer in light of a finding of non-liability on a wrongful death theory, since both required "willfulness". Upon reconsideration, requested by appellee, the court withdrew its new trial orders. In its reconsideration motion, appellee had argued that the defendants had failed to request a new trial and that the district court had no discretion to order a new trial in the circumstances of this case. Although the police officer who was found liable filed an appeal, he has since withdrawn it.

1. *Factual Background*

At about 6:30 p.m. on September 28, 1981, the Springfield Police Department received a phone call on its 911 emergency line reporting a violation of a restraining order. A cruiser was sent to investigate. A second call about an hour later reported that the subject of the restraining order had called the apartment and threatened to come after its occupants with a knife. Another cruiser was dispatched. A third call reporting that the subject was breaking down the door and a fourth stating that Pamela Etter was being assaulted at that moment also were received, and cruisers were sent to the scene. The officers who arrived after the last call found that Etter had been abducted by Clinton Thurston and driven away in his 1971 Mercury.

The car was first spotted by Officer Erich Risch, who was wearing a red windbreaker over his uniform and driving an unmarked car that had flashing headlights, a portable blue light, and a siren, all activated. When Thurston's car stopped at an intersection, Risch walked up to the driver's window and identified himself as a police officer, but Thurston drove off.

Risch gave chase, other police cruisers joined in, and Officers Frank Daigneau and John Troy set up a roadblock at a point ahead of the chase. As Thurston passed by the barrier at about twenty-five miles per hour, both officers brandished guns and Troy fired at the car. A nick was found later in the left rear wheel. Appellant claimed that Thurston had accelerated toward Daigneau, narrowly missing Troy. After this episode, a police officer reported to the dispatcher that Thurston "had attempted to run over a police officer." The dispatcher then broadcast: "This is not only a violation of a restraining order, it's assault be means of a vehicle." According to the rules

and regulations of the City's police department, the use of firearms is allowed to effect an arrest when certain circumstances exist, including an officer's reasonable belief that the crime in question includes the use or threatened use of deadly force. Lieutenant Thomas Rondeau testified that a car is considered a deadly weapon.

Thurston turned left at the first roadblock, and encountered a second one a block away. Officer Kenneth Schaub had placed his vehicle across the right hand lane while he stood in the middle of the three lanes and attempted to flag down Thurston's vehicle. Thurston again failed to stop, and the City claims that he swerved toward Schaub and that Schaub had to dive to avoid being hit. Schaub then fired at the car. Schaub testified that a moment earlier, as Thurston headed toward the roadblock, Schaub drew his gun and would have shot to kill if he had been able to get a clear shot.

Officer Theodore Perry, who was on a motorcycle and had not heard instructions from headquarters that motorcycles should try to stay out of the pursuit, accelerated past several cruisers at this point, and engaged in a cat and mouse exchange with Thurston. Three times, the officer moved up even with the rear window on the driver's side of Thurston's car, and each time Thurston swerved toward the left. Perry fired at Thurston after the second and third swerves, apparently hitting him with the second shot. The vehicle slowed down and came to a stop. Perry's first shot apparently hit a house near where Thurston's car coasted to a stop.

As Risch ran to Thurston's car, he ordered him to get out. Risch testified that when Thurston failed to do so, Risch leaned in through the driver's window and struck Thurston on the head with his flashlight, and then he and several other officers dragged the apparently unconscious Thurston from the car.[3]

[3] At about this time, Thurston's car lurched forward, hitting a cruiser that had stopped in front of it. A citizen witness testified that Thurston's car hit the cruiser before Thurston's car came to a complete stop, when it was traveling at about three to five miles per hour. Officer Perry testified that Thurston's vehicle had stopped and then began to move again as Thurston was being pulled from the car, possibly as his foot came off the brake. Pamela Etter testified that Thurston brought his car to a complete stop and that he hit the cruiser as he started to go again.

They threw him to the ground, and, as he lay face down, they handcuffed him. Perry did not report to the street supervisor that he had shot at Thurston, and the officer who transported Thurston to the hospital was not told that any shots had been fired or that Thurston may have been shot. It was not until someone from the hospital called the police station to report that Thurston was in serious condition that street supervisor Rondeau suggested that doctors check for a bullet wound. Doctors then took x-rays and detected the bullet which had entered Thurston's brain. He died a short time later.

2. *Discussion*

a. *Judgment NOV and Directed Verdict*

It is by now axiomatic that § 1983 liability may not be imposed upon a municipality simply on the basis of *respondeat superior*, but it must instead be premised on a finding that the "injuries [were] inflicted pursuant to government 'policy or custom'", *City of Oklahoma City* v. *Tuttle*, 105 S. Ct. 2427, 2429 (1985); *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 and n.58 (1978); *Voutour* v. *Vitale*, 761 F.2d 812, 819-20 (1st Cir. 1985). Appellee argued primarily that the City should be found liable here because it had a policy or custom of inadequately training its police officers. A number of cases, including this court's recent *Voutour* v. *Vitale*, have accepted "inadequate training" as an actionable municipal policy or custom. *Marchese* v. *Lucas*, 758 F.2d 181, 188-89 (6th

Cir. 1985); *Wellington* v. *Daniels*, 717 F.2d 932, 936 (4th Cir. 1983); *Herrera* v. *Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981); *Owens* v. *Haas*, 601 F.2d 1242, 1246-47 (2nd Cir.), *cert. denied*, 444 U.S. 980 (1979). Under this theory, the city is liable either for failing to implement a training program for its officers or for implementing a program that was grossly inadequate to prevent the type of harm suffered by the plaintiff. *Voutour* v. *Vitale*, 761 F.2d at 820 ("supervisor must demonstrate at least gross negligence amounting to deliberate indifference, and . . . this conduct must be causally linked to the subordinate's violation of plaintiff's civil rights"); *Hays* v. *Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982); *Wellington* v. *Daniels*, 717 F.2d at 936 (4th Cir. 1983); *see Languirand* v. *Hayden*, 717 F.2d 220, 227-228 (5th Cir. 1983).

Although we review the evidence in more detail later, we summarize it briefly here, as background for our inquiry into the Supreme Court's latest holding as to the required showing of a policy of inadequate training. Here, in an admittedly close case, the evidence consisted principally of: (1) testimony that there was but little guidance for undertaking an automobile chase; (2) testimony, contrary to that of the officers, that Thurston was not posing a life-threatening hazard to them; (3) a department rule on the use of firearms which in part required preliminary resort to less severe alternatives, arguably ignored by the officers; (4) another part of the rule which proscribed firing where there was substantial danger to innocent people, arguably violated by two officers; (5) a dispatcher's arguably overzealous announcement on police radio; and (6) evidence of looseness in investigating shootings.

Four members of the Supreme Court recently have raised doubts as to whether a harm allegedly caused by a policy of gross negligence in police training could meet § 1983's standard of causation. *Tuttle*, 105 S. Ct. at 2436 n.7. We, however, continue to believe this is a viable theory of municipal liability

because we conclude that it is possible to show "an affirmative link", *Tuttle*, 105 S. Ct. at 2436, between a policy of inadequate training and resort to harmful police methods. We base our conclusion on the belief that properly trained officers would avoid certain techniques as inappropriate for some circumstances. In *Voutour*, we referred to the affidavit of a putative expert witness in police training and procedure who stated that the shooting in that case was a highly predictable result of the inadequate training received by the town's police officers. 761 F.2d at 821-22. Even without expert testimony, we believe a plaintiff could show by a preponderance of the evidence that, for example, the failure to train police officers in how to conduct high speed chases caused the death of an innocent pedestrian struck either by a police cruiser or the suspect's car.

We thus come to the more specific issue of whether inadequate training was a viable theory in this case. Appellant would have us find that Clinton Thurston was killed as the result of a single incident of police action which, under *Tuttle*, 105 S. Ct. 2427, is insufficient, as a matter of law, to establish a municipal policy or custom. In *Tuttle*, a police officer who had been on the Oklahoma City force for ten months had responded alone to an all points bulletin indicating a robbery in progress at a bar. The officer testified that Tuttle walked toward him, as the officer entered the bar, that the officer grabbed Tuttle's arm to restrain Tuttle from leaving, and that Tuttle eventually broke free and went outside, ignoring the officer's commands to "halt". When the officer stepped through the doorway, the officer saw Tuttle crouched on the sidewalk, with his hands in or near his boot. The officer again ordered Tuttle to halt, but when Tuttle started to come out of the crouch, the officer fired his weapon. The officer testified at trial that he believed Tuttle had removed a gun from his boot, and that the officer's life was in danger.

In reversing a $1.5 million judgment against the city, the Court focused on an instruction given by the district court which allowed the jury to "'infer'" from "'a single unusually excessive use of force . . . that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge", *Tuttle*, 105 S. Ct. at 2435. Justice Rehnquist, writing for a plurality of four, stated that this inference "allows a § 1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker". *Id.* at 2435. He continued:

> "Presumably, here the jury could draw the stated inference even in the face of uncontradicted evidence that the municipality scrutinized each police applicant and met the highest training standards imaginable. To impose liability under those circumstances would be to impose it simply because the municipality hired one 'bad apple'". *Id.*

The plurality further observed that it did not matter in *Tuttle* that respondent introduced independent evidence of inadequate training because "[t]here is nothing elsewhere in this charge that would detract from the jury's perception that it could impose liability based solely on this single incident", *id.*

Tuttle thus holds that a "single incident" of police misconduct does not, standing alone, permit an inference of a policy of inadequate training. That proposition does not, as a matter of law, dispose of this case. There was no instruction here equivalent to the one in *Tuttle* allowing a jury to infer a policy *solely* from the occurrence of the harm. The district court here told the jury that "[a]n incident of excessive force on the part of the police officers standing by itself, is insufficient to find

the City of Springfield liable under Section 1983". Additionally, appellee presented evidence not only as to what occurred during the pursuit of Thurston but also as to the training of the City's police officers and the department's rules and regulations. *Tuttle* does not prevent a jury from drawing inferences from the police officers' alleged misconduct, but simply requires that those inferences be based on more than just the fact that the plaintiff was hurt at the hands of a police officer. In this case, the jury was presented with evidence of inadequate training, and was not told that it could find municipal liability "even in the face of uncontradicted evidence that the municipality" adhered to "the highest training standards imaginable", 105 S. Ct. at 2435. *See Rymer* v. *Davis*, No. 83-5586, slip op. at 2-3 (6th Cir. Oct. 28, 1985).

Moreover, we think a second basis of distinction arises out of the facts of the cases. *Tuttle* involved only one officer who fired one shot. *See also Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983) (shooting incident involving one police officer). In contrast, this case involves at least ten officers and three separate shooting incidents, in which three different officers fired their weapons. We thus believe that this is not the sort of "single incident" that the Supreme Court addressed in its opinion in *Tuttle*, and we find support for this reading in both Justice Rehnquist's plurality opinion, 105 S. Ct. at 2435 ("one bad apple'"), and in Justice Brennan's concurring opinion:

> "A single police officer may grossly, outrageously, and recklessly misbehave in the course of a single incident. Such misbehavior may in a given case be fairly attributable to various municipal policies or customs, either those that authorized the police officer so to act or those that did not authorize but nonetheless were the 'moving force,' *Polk County* v. *Dodson*, 454 U.S. 312, 326, 102 S. Ct. 445, 454,

70 L.Ed.2d 509 (1981), or cause of the violation. In such a case, the city would be at fault for the constitutional violation. Yet it is equally likely that the misbehavior was attributable to numerous other factors for which the city may not be responsible; the police officer's own unbalanced mental state is the most obvious example. . . . To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and the to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* liability rejected in *Monell*." 105 S. Ct. at 2440.

The significance of the factual differences between these cases lies in the inferences a jury may properly draw simply from the incident itself. Justice Rehnquist observed in *Tuttle* that where the municipal policy relied upon for liability is not itself unconstitutional, "considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation", 105 S. Ct. at 2436 (footnotes omitted). We believe proof of the sort of incident we have before us contributes toward proof of the fault and causation elements of the city's liability to a much greater extent than does proof of the sort of single incident involved in *Tuttle*. This is so because the widespread activity here is more likely to reflect the operating procedures of the police department than would a single incident such as occurred in *Tuttle*. Although we doubt that even circumstances such as those here would justify an instruction such as that given in *Tuttle*, we need not decide that issue. For purposes of this case, we only find that *Tuttle's*

"single incident" holding does not preclude municipal liability, as a matter of law, simply because the police officers' actions occurred within a "single" evening.[4] The Fifth Circuit reached a similar conclusion in the post-*Tuttle* decision of *Grandstaff* v. *City of Borger*, 767 F.2d 161 (1985). *Grandstaff* involved the shooting death of an innocent bystander during the pursuit of a fleeing suspect. In its opinion, the Fifth Circuit noted the absence of direct testimony of prior misconduct within the Borger police force and "that isolated instances of police misbehavior are inadequate to prove the knowledge and acquiescence by a city policymaker in that manner of conduct", 767 F.2d at 171. The court went on to point out, however, that "[t]he evidence does provide repeated acts of abuse on this

[4] It can not be that an incident that is single only in that it begins and ends within a confined period of time can never give rise to a finding of municipal liability. We agree with the court in *Leite* v. *City of Providence*, 463 F. Supp. 585, 590 (D.R.I. 1978), that a "city's citizens do not have to endure a 'pattern' of past police misconduct before they can sue the city under section 1983". That court went on to note the circumstances in which liability properly could attach in the absence of such a pattern:

> "If a municipality completely fails to train its police force, or trains its officers in a reckless or grossly negligent manner so that future police misconduct is almost inevitable, the municipality exhibits a 'deliberate indifference' to the resulting violations of a citizen's constitutional rights. In such a case, the municipality may fairly be termed as acquiescing in and implicitly authorizing such violations. . . . The training and supervising of these police officers must be so inadequate and the resulting misconduct so probable, that the city can fairly be considered to have acquiesced in the probability of serious police misconduct." *Id.* at 590-91.

See also City of Oklahoma City v. *Tuttle*, 105 S. Ct. 2427, 2441 (Brennan, J., concurring) ("A § 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims; by exposing a municipal defendant to liability on the occurrence of the first incident, it is hoped that future incidents will not occur.").

night, be several officers in several episodes, tending to prove a disposition to disregard human life and safety so prevalent as to be police policy or custom". *Id*. The court observed that all six officers of the department's night shift were involved in the incident. In upholding the jury verdict for the plaintiff, the court emphasized that the police chief's failure to make changes in practice in the aftermath of this incident allowed an inference that the officers' actions were "the way things are done and have been done in the City of Borger", *id*., and thus reflected city policy. Like *Grandstaff*, the instant case involved many officers and a series of exchanges between police officers and civilians. This was a case, unlike *Tuttle*, arguably involving more than "one bad apple".

Our conclusion that *Tuttle* does not bar this suit does not end the inquiry into whether the district court erred in rejecting the City's motions for directed verdict and judgment notwithstanding the verdict. We must next look at whether, with the evidence before it, the jury could not properly find that the City was grossly negligent in its training of police officers and that that negligence was the proximate cause of Thurston's death. *Voutour* v. *Vitale*, 761 F.2d at 820.

As we begin our analysis, we have uppermost in mind the structures of both law and sense that dictate a deference to the facts and inferences therefrom as they could have been found by the jury. In reviewing denials of the motions for directed verdict and judgment notwithstanding the verdict, we may reverse the district court only upon a finding that the evidence could lead reasonable persons to the sole conclusion that the City was not liable. *Wildman* v. *Lerner Stores*, 771 F.2d 605, 607 (1st Cir. 1985). We must review the evidence in the light most favorable to appellee. *Fishman* v. *Clancy*, 763 F.2d at 485, 486 (1st Cir. 1985). These principles are particularly pertinent in a case like this, compared to, say, a simple personal injury case where, traditionally, a plaintiff tends to excite sympathy. For in this case, as our narration of facts reveals, the conduct and character of decedent are anything but evocative of sympathy. Accordingly, if a soundly instructed jury, which would in all likelihood view the conduct of decedent to be as reprehensible as do we, nevertheless found the defendants liable, we do not lightly contemplate reversal.

We are unable to say that no jury could find that the City was grossly negligent in failing to train its officers, causing their use of excessive force against Clinton Thurston.[5] Although evidence on the Springfield Police Department's training practices was sparse, the testimony of two officers indicated that the department gave officers virtually no guidance in apprehending suspects fleeing in motor vehicles who ignored orders to stop. Schaub testified that he was told not to set up physical roadblocks but that he should use his lights and siren, stand in the street, and put up his hand in a stopping motion. Troy testified that his training on stopping a car consisted of being told to move up behind it, put on his lights and siren, and hope the suspect pulls over. The jury could have found that partial roadblocks were not an effective method of slowing down a suspect who was unwilling to stop, and that some technique short of shooting the driver should have been used. The jury might have believed that deploying several police cars to crowd or surround Thurston's car might have forced him

---

[5] The City does not challenge the jury's conclusion that Clinton Thurston's constitutional rights were violated. It argues only that it is improper to impose liability on the City for the violation.

The City also does not challenge the jury's implicit finding that decisions regarding the type of training received by Springfield's police officers are a matter of policy attributable to the City, and we therefore do not address the issue of when an official's actions properly may be designated as "municipal policy". *See Voutour* v. *Vitale*, 761 F.2d 812, 823 (1st Cir. 1985); *Bennett* v. *City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984). *See also Pembaur* v. *City of Cincinnati*, 746 F.2d 337, 341 (4th Cir. 1984), *cert. granted*, 105 S. Ct. 3475 (1985).

to slow down, or that sheer persistence eventually might have worn Thurston down, or that calling in reinforcements might have intimidated him into compliance. The jury also could have believed the testimony that Thurston repeatedly shouted to the officers that he was going only to his sister's house, which, in fact, was located a short distance from where the pursuit ended. If the jury believed the officers heard Thurston and knew he might stop voluntarily, the decisions to shoot, particularly the decisions to shoot to kill, reasonably could be viewed as the direct result of training that was grossly inadequate.

The jurors could have believed that the actions of two officers, in particular, evidenced a failure to consider methods of stopping a fleeing suspect less drastic than shooting him. Presumably Perry could have shot out the rear tire of the car from his positions right behind and next to Thurston's vehicle, forcing the car to slow down so that the officers could surround it. Schaub, too, was eager to shoot to kill. Although he fired only after Thurston ran through the second roadblock, allegedly forcing Schaub to jump out of the way, Schaub testified that he would have shot to kill sooner if he could have gotten a clear shot. Moreover, the jury could have believed Etter's testimony that Thurston did not try to run down any officers, which would make their shootinngs appear even more precipitous.

The fact that proper police procedures should include less severe means of stopping a fleeing suspect is underscored by the Springfield Police Department's own Rule 28. Section 12 of that rule, which governs the use of firearms, states that "[a] department member shall not discharge a firearm in the performance of duty, except under [certain specified] circumstances, *and then only after all other reasonable alternatives have been exhausted and where there is no substantial danger to the public*". (Emphasis added.) If the department recognized the

importance of pursuing alternatives to deadly force, as this rule indicates, and yet failed to train on any alternative methods of stopping the suspect in a high-speed pursuit, a jury properly could draw the inference that the department made a conscious policy decision not to do such training. And since the jury may have believed that use of alternatives such as those we have described would have prevented the shooting of Thurston, this rule provides additional support for jury conclusions that (1) the City was grossly negligent in failing to train its officers on ways to capture a fleeing suspect without killing him, and that (2) an "affirmative link" existed between the failure to train and Thurston's death.

The jury also could have drawn an inference of inadequate training from the failure of two police officers to abide by the department rule prohibiting the discharge of firearms to effect an arrest when innocent persons are at risk. Although the evidence showed that the officers knew of the rule, their actions permitted an inference that no shooting would have taken place had the officers been properly trained on how to apply it to actual situations. Schaub apparently aimed either at Thurston or generally at his car, not at the tires, and a jury reasonably could believe that Schaub's firing created a risk to Etter. Perry's decision to shoot to kill the driver in a high speed chase unquestionably put the life of the passenger, Etter, in jeopardy. Although there was conflicting testimony as to whether Etter was sitting up in the front seat, or slumped down, the jury could have found that she was visible and that at least some of the officers knew there was a passenger because the pursuit began with an alleged abduction, a fact which had been transmitted over police radio.[6] In addition, one bullet, perhaps Perry's first

---

[6] Perry testified that he shot at Thurston in part to stop the fleeing suspect and in part to protect himself because Thurston was trying to knock him off his motorcycle. The latter reason was unjustified since department rules say a

one, landed in the door between the garage and breezeway of a private home located near where Thurston's car stopped, suggesting an additional risk to other innocent people. Rondeau testified that Perry's shots were fired in a thickly settled area.

Finally, although appellee emphasized the policy of inadequate training as the basis for municipal liability, she also pointed to evidence of other policies which the jury may have considered in reaching its verdicts. The jury could have believed that this department's policy was to use deadly force whenever it technically was permitted by the rules, even though something less would have sufficed. *See Tennessee* v. *Garner*, 105 S. Ct. 1694, 1701 (1985) ("if . . . there is probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used *if necessary to prevent escape*" (emphasis added). The dispatcher's announcement that Thurston's alleged attempt to run down a police officer means "this is assault by means of a vehicle", a deadly weapon, could be viewed as an indirect authorization for the use of deadly force, causing the officers to shoot precipitously. Captain Daniel Spellacy testifed that he was monitoring the pursuit with the dispatcher, and so the jury could have found that the

chase is to be aborted if there is danger to officers, and Perry unquestionably could have avoided the danger. In fact, Captain Spellacy had ordered motorcycles out of this pursuit because of possible danger to cycle officers, but Perry testified that he had not heard this order. It would seem that Perry would be justified in continuing the pursuit once he perceived he was in danger only because he felt that Etter's life was in jeopardy. He testified, however, that he did not know there was a passenger in the car. Thus, the jury could have found his continuing involvement, which resulted in the decision to shoot, to be further evidence of inadequate training on conducting pursuits. Even if the jury disbelieved him and concluded that he knew Etter was in the car, it could have found a significant lapse in training in his decision to shoot the driver of the car in which she was a passenger.

man in charge of the department that night approved the escalating intensity of the pursuit.

Appellee also argued that the police department's apparently sloppy post-shooting investigative procedures increased the likelihood of officers shooting without justification. Her theory is that neglect in investigating shootings means that there will be a low level of accountability following the use of firearms. The result, in effect, is a policy of encouraging precipitous shooting. As evidence of sloppiness, appellee points out that the department had no policy on preserving all evidence from a shooting and that two officers, in fact, disposed of spent cartridges, making it more difficult to investigate the shootings. The jury also could have believed that Perry never told street supervisor Rondeau at the scene that he had fired his weapon at Thurston, a neglect which Rondeau testified hampered his ability to investigate.

On their own, these other policies were not proven sufficiently or linked sufficiently with the harm to impose municipal liability.[7] The inferences to be made from these other facts merely lend weight to what we view as the policy a jury reasonably could find as the "moving force", *Polk Co.* v. *Dodson*, 454 U.S. 312, 326 (1981), behind the actions which led to Thurston's death, the policy of inadequate training.

[7] We agree with appellant that the district court's stated reason for denying the motion for judgment notwithstanding the verdict also reflects an insufficient basis for imposing municipal liability. The court suggested that the City had ratified defendant Perry's action by clearing him and finding that he had acted in accordance with the police department's policies. We are unconvinced that a failure to discipline Perry or other officers amounts to the sort of ratification from which a jury properly could infer municipal policy. *Cf. Grandstaff* v. *City of Borger*, 767 F.2d 161 (5th Cir. 1985). We need not agree with the district court's reasoning to affirm its judgment, however. *Chevron U.S.A.* v. *National Resources Defense Council*, 104 S. Ct. 2778, 2781 nn.7-8 (1984); *Riley Co.* v. *Commissioner*, 311 U.S. 55, 59 (1940); *Casagrande* v. *Agoritsas*, 748 F.2d 47, 48 n.1 (1st Cir. 1984).

Thus, we hold that a jury reasonably could have found that it was the department's gross negligence in training that caused the premature use of deadly force against Thurston.[8]

b. *Jury Instruction*

Appellant claims that the jury charge was inadequate because it failed to indicated that liability against the City could not be predicated on an isolated incident of negligent training, but must instead be based on "a pattern of deliberate supervisory inaction and indifference". The City also contends that the trial court failed to make clear the issue of proximate cause, specifically that an "affirmative link" must be established between the municipal policy and the unconstitutional activity of its employees. Finally, the City argues that it was entitled to an instruction that liability may result only "from the failure of supervisory officials to remedy a *specific* situation, of which they knew or should have known in the exercise of reasonable diligence, the continuation of which causes a deprivation of constitutional rights".

The trial court charged the jury as follows on the claim against the City:

> "The City of Springfield is the employer of police officers, but the City cannot be held liable merely because the police officers involved are its employees. An incident of excessive force on the part of the

[8] Appellee argues that the jury verdict also is supportable on the basis of an Eighth Amendment claim of deliberate indifference to Thurston's medical needs after he was shot. Although the complaint alleges that Thurston was denied adequate medical care, this theory was not presented to the jury and appellee failed to provide any evidence suggesting that Thurston's treatment after the shooting aggravated the harm from the shooting itself. We therefore reject this claim.

police officers standing by itself, is insufficient to find the City of Springfield liable under Section 1983. A governmental body can be found responsible for the deprivation of a person's civil rights if the actions taken by its employees, are in accordance with a custom or practice of the government and those actions caused the deprivation of the person's rights.

"The custom or practice may be an official policy of the City; however, the custom or practice does not have to be authorized by written law, nor must it be the result of formal approval through official decision-making channels. It is enough that the customs or practices are so permanent and well-established, as to demonstrate implicit authorization or approval or acquiescence in the unconstitutional conduct. Where a city's failure to train, supervise, or discipline police officers is reckless or grossly negligent, and this failure constitutes a custom or practice of the city, then the city may be held liable under Section 1983.

"If you are convinced by a preponderance of the evidence that Clinton Thurston was deprived of his civil rights by the actions taken by the defendant police officers then you must decide if the actions taken were done in accordance with the custom or practice of the City of Springfield.

"If you are convinced by a preponderance of the evidence that the officers acted in conformity with the City's custom or practice, and that this custom or practice violated Clinton Thurston's civil rights, then you may find for the plaintiff and her claim against the City of Springfield. Obviously the reverse is true if you find this is not so, then you will find for the City in this claim."

Earlier in its charge, the district court explained the three elements necessary for proof of plaintiff's claim under Section 1983: that the defendants' conduct violated Thurston's federal constitutional right not to be deprived of life without due process of law; that the defendants acted under color of law; and that the defendants' acts were the proximate or legal cause of Thurston's damages. The court defined proximate cause as follows:

> "An injury or damage is proximately caused by an act or failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission."

We agree that these jury instructions could have been more detailed. The court could have used the Supreme Court's language to explain the need for an "affirmative link" between the City's policy and the harm. It could have emphasized the distinction between negligence and reckless or grossly negligent conduct. But while the district court's instructions could have been better, they were not defective. The district court did not make the error of the trial court in *Tuttle*. Rather than allowing liability based solely on the incident in which Thurston was harmed, the court here charged that one incident standing by itself is insufficient to make the City liable under Section 1983. Its instructions included a charge on proximate cause, and it instructed the jury that it must find a failure to train which amounted to gross negligence.

A defendant is not entitled to any specific words of instruction, but only to instructions that properly convey the applicable

law of the case. 9 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2556 (1971); *see Cupp* v. *Naughton*, 414 U.S. 141, 146-47 (1973); *Dyer* v. *Ponte*, 749 F.2d 84, 88 n.5 (1st Cir. 1984); *United States* v. *Morris*, 700 F.2d 427, 433 (1st Cir. 1983). We hold that the instructions in this case did so.

Accordingly, the judgment of the district court is affirmed

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

Appendix B.

United States Court of Appeals
For the First Circuit

No. 85-1078

LOIS THURSTON KIBBE, ETC.,
Plaintiff, Appellee,

v.

CITY OF SPRINGFIELD,
Defendant, Appellant.

JUDGMENT

Entered: November 27, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs: Pikula and Nagel]

Appendix C.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

LOIS THURSTON KIBBE, Plaintiff	)	
v.	)	CIVIL ACTION NO. 82-0275-F
CITY OF SPRINGFIELD and THEODORE PERRY, Defendants	)	

MEMORANDUM AND ORDER

December 21, 1984

FREEDMAN, D.J.

Defendants in the above-captioned case have moved for a judgment notwithstanding the verdict after a jury found against them and for the plaintiff on plaintiff's civil rights claim.[1] Having heard the parties' arguments, and having reviewed the evidence in the case, the Court has concluded it must deny both defendants' motions and grant a new trial because of inconsistencies in the jury verdicts.

---

[1] The three other defendants, Eric Risch, John Troy and Kenneth Schaub, are now out of the case, since the jury found in their favor and plaintiff has not objected.

Plaintiff is the administratrix of the estate of Clinton Thurston, who was shot and killed by defendant Officer Perry in a car and motorcycle chase on September 28, 1981. Perry, who was on the motorcycle, was chasing Thurston, who was driving a car. Thurston was swerving his car back and forth. Perry could have dropped back to prevent himself from being struck; instead he shot Thurston in the head. There was evidence both that Perry shot Thurston in self defense after Thurston three times tried to veer his car into Perry and also that Perry shot Thurston because Perry thought Thurston tried to run down other officers involved in the chase. Thurston had an abducted passenger with him, but Perry was unaware of this. In any case, a subsequent internal investigation cleared Perry on the grounds that he had followed his department's rules and regulations.

The case went to the jury on civil rights and wrongful death theories. The civil rights claim ran against both Perry and the City. The jury was instructed that in order to find Perry liable, it must conclude that Perry unreasonably used deadly force in apprehending Thurston. The Court instructed the jury that in Massachusetts a police officer constitutionally may use deadly force in effecting an arrest if 1) the arrest is for a felony; 2) the officer reasonably believes the force employed creates no substantial risk of injury to innocent persons; and 3) the officer reasonably believes that (a) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (b) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed. *Commonwealth* v. *Klein*, 363 N.E.2d 1313, 1318-19 (1977).

As for the City's civil rights liability, the Court instructed the jury that the City could be found liable only if Perry's actions were in accordance with a custom or policy of the City and those actions caused the deprivation of Thurston's rights. *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 690 (1978).

The Court instructed the jury that, if it found the plaintiff entitled to compensatory damages, it could consider whether an assessment of punitive damages against the individual officer, but not the City, was in order. The jury was told it could award punitive damages only if it found Perry acted wilfully, maliciously, or with reckless disregard of Thurston's constitutional rights.

The wrongful death claim ran against only defendant Perry. Following the Massachusetts wrongful death statute, Mass. Gen. Laws ch. 229, § 2, the Court instructed the jury that it could assess damages in the amount of the value of the decedent to various living persons if it found Perry's conduct to be either negligent or wilful, wanton or reckless. *Id.*

The jury returned inconsistent verdicts. On special verdict forms, the jury found defendant Perry liable on the civil rights theory and awarded actual damages of $1 and punitive damages of $500. The jury also found the City liable for a deprivation of Thurston's civil rights and awarded actual damages of $50,000. The jury found for Perry on plaintiff's wrongful death claim.

The verdicts are inconsistent in two respects, and a new trial must be had as to both defendants on both theories. First, the $1/$50,000 discrepancy is inconsistent, since the two sums are supposed to represent compensation for the same civil rights violation, namely, Thurston's death. There is no way to explain how a policy of using excessive force could cause more actual damage to a deceased individual than the use of the excessive force itself.

The second inconsistency is between the assessment of punitive damages against Perry and the finding of nonliability on the wrongful death theory. Both require wilful or reckless conduct. In fact, it appears that the "wilfulness" in the punitive standard might be even higher than that required in the wrongful death statute, so that a finding on the former would necessarily encompass, if not equal, a finding on the latter. It is possible that the jury found Perry *liable* for wrongful death, but was unable to assess his monetary worth to any of the statutorily eligible individuals. How-

ever, there was room on the special verdict slip for the jury to indicate it reached this result, and the Court is hesitant to infer that the jury just filled out the form incorrectly.

Both defendants have moved for judgment notwithstanding the verdict. Fed. R. Civ. P. 50(b). Defendant Perry argues for a j.n.o.v. solely on the grounds of the inconsistent verdicts; however, the remedy for this is a new trial, especially where there is ample evidence from which a jury could find that Perry violated Thurston's civil rights.

The City's arguments for a j.n.o.v. are somewhat more substantive. The City contends that under current standards, a municipality cannot be held liable for a negligent failure to train its officers absent a pattern of similar incidents or a history of widespread abuse. *Wellington* v. *Daniels*, 717 F.2d 932, 936 (4th Cir. 1983); *Languirand* v. *Hayden*, 717 F.2d 220, 227-28 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2656 (198_). In short, the plaintiff must demonstrate that the City had a policy of being deficient in training its police officers.

The Court is of the opinion that there was evidence adduced at trial from which a jury could infer such a policy, and therefore the City's j.n.o.v. motion must be denied. Specifically, the Springfield Police Department cleared defendant Perry of any wrongdoing in this matter. In fact, it found he had acted in accordance with the Department's own policy. However, it is not clear from the evidence why Perry fired: did he shoot Thurston because he knew Thurston was a dangerous fleeing felon, *see Commonwealth* v. *Klein, supra* p. 2, or did he take unreasonably excessive action to protect himself from Thurston's swerving vehicle? If the latter is the case — and there was evidence from which a jury could conclude this — then Perry acted unconstitutionally pursuant to his department's own policies.

These competing conclusions that can be drawn from the evidence in the case preclude granting the City's j.n.o.v. motion. And, because of the inconsistencies in the special verdicts, there must be a new trial for both defendants.

The motions of defendants Perry and City of Springfield for judgment notwithstanding the verdict are DENIED. The new trial will be on January 14, 1985 at 11:30 a.m. before a fresh jury panel.

It is So Ordered.

FRANK H. FREEDMAN
United States District Judge

Appendix D.

JUDGMENT IN A CIVIL CASE

United States District Court DISTRICT MASSACHUSETTS

CASE TITLE
LOIS THURSTON KIBBE, Administratrix of the Estate of Clinton Thurston v. CITY OF SPRINGFIELD, et al.

DOCKET NUMBER
CA 82-0275-F

NAME OF JUDGE OR MAGISTRATE
Frank H. Freedman

☑ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

JUDGMENT FOR THE PLAINTIFF AGAINST THE DEFENDANT THEORDORE PERRY ON VIOLATIONS OF THE CIVIL RIGHTS STATUTE WITH COMPENSATORY DAMAGES AWARDED IN THE AMOUNT OF $1.00 AND PUNITIVE DAMAGES IN THE AMOUNT OF $500.00.

JUDGMENT FOR THE DEFENDANT, THEORDORE PERRY ON VIOLATIONS OF THE WRONGFUL DEATH STATUTE.

JUDGMENT FOR THE PLAINTIFF AGAINST THE DEFENDANT, CITY OF SPRINGFIELD, ON VIOLATIONS OF THE CIVIL RIGHTS STATUTE WITH COMPENSATORY DAMAGES AWARDED IN THE AMOUNT OF $50,000.00.

JUDGMENT FOR THE DEFENDANTS ERIC RISCH, JOHN TROY AND KENNETH SCHAUB ON VIOLATIONS OF THE CIVIL RIGHTS STATUTE.

JUDGMENT FOR THE DEFENDANTS, ERIC RISCH, JOHN TROY, KENNETH SCHAUB AND THE CITY OF SPRINGFIELD ON THE PLAINTIFF'S CLAIMS OF CONSCIOUS SUFFERING, THE COURT HAVING DIRECTED VERDICTS ON THAT CLAIM.

JUDGMENT FOR THE DEFENDANTS ERIC RISCH, KENNETH SCAUB, JOHN TROY AND THE CITY OF SPRINGFIELD ON THE PLAINTIFF'S WRONGFUL DEATH CLAIMS, THE COURT HAVING DIRECTED VERDICTS ON THOSE CLAIMS.

Clerk
George F. McGrath

Date
11/23/84

Deputy Clerk
John C. Stuckenbruck

Appendix E.

MASSACHUSETTS GENERAL LAWS.
Chapter 209A.

§ 3. Complaint Requesting Protection From Abuse; Particular Orders and Duration of Orders; Effect of Prior or Pending Divorce Orders.

A person suffering from abuse from an adult or minor family or household member may file a complaint in the court requesting protection from such a abuse, including, but no limited to, the following orders:—

(a) ordering the defendant to refrain from abusing the plaintiff whether the defendant is an adult or minor;

(b) ordering the defendant to vacate forthwith the household. Notwithstanding the provisions of section thirty-four B of chapter two hundred and eight, an order to vacate shall be for a fixed period of time, not to exceed one year, at the expiration of which time the court may extend any such order upon motion of the plaintiff for such additional times as it deems necessary to protect the plaintiff from abuse;

(c) awarding the plaintiff, in the case of husband and wife, temporary custody of a minor child;

(d) ordering the defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody or both, when the defendant has a legal obligation to upport such a person;

(e) ordering the defendant to pay to the person abused monetary compensation for losses suffered as a direct result of such abuse. Compensatory losses shall include, but not be limited to, loss of earnings or support, out-of-pocket losses for injuries sustained, medical and moving expenses and resonable attorneys' fees;

(f) ordering the plaintiff's address to impounded as provided in section eight.

No filing fee shall be charged for the filing of the complaint. The plaintiff shall not be charged for copies of orders entered by the court.

Any relief granted by the court shall be for a fixed period of time not to exceed one year, at the expiration of which time the court may extend any order, upon motion of the plaintiff, for such additional time as it deems necessary to protect the plaintiff from abuse. The court may modify its order at any subsequent time upon motion by either party.

No order under this chapter shall in any manner affect title to real property.

Any action commenced under the provisions of this chapter shall not preclude any other civil or criminal remedies. A party filing a complaint under this chapter shall be required to disclose any prior or pending actions for divorce under chapter two hundred and eight, separate support under two hundred and nine, or abuse prevention under this chapter.

If there is a prior or pending order from the probate and family court department of the trial court for divorce under chapter two hundred and eight, or separate support under chapter two hundred and nine, an order issued in the district court or Boston municipal court departments pursuant to this chapter shall be restricted to ordering the defendant to refrain from abusing the plaintiff whether the defendant is an adult or minor, or ordering the defendant to vacate forthwith the household.

If the parties to a proceeding under this chapter are parties in a subsequent proceeding for divorce under chapter two hundred and eight or for separate support under chapter two hundred and nine, any custody or support order or judgment issued in the divorce or separate support proceeding shall supersede any prior custody or support order under this chapter.

. . . . . .

§ 6 Duties of Law Oficer; Notice of Rights.

Whenever any law officer has reason to believe that a family or household member has been abused or is in danger of being abused, such officer shall use all reasonable means to prevent further abuse, including: (1) remaining on the scene as long as there is immediate danger to the physical safety of such person without the presence of a law officer, including but not limited to staying in the dwelling unit for a reasonable period of time; (2) assisting such person in obtaining medical treatment necessitated by an assault, which may include driving the victim to the emergency room of the nearest hospital, or arranging for appropriate transportation to a health care facility, any law to the contrary notwithstanding; (3) giving such person immediate and adequate notice of his or her rights; (4) arresting any person whom the officer has probable cause to believe has committed a felony; (5) arresting any person who has committed, in the officer's presence, a misdemeanor which involves abuse; (6) arresting any person whom the officer has probable cause to believe has committed a misdemeanor pursuant to section thiry-four C of chapter two hundred and eight or section seven of chapter two hundred and nine A.

The notice as required in clause (3) of section six shall consist of handing such person a copy of the following statement written in English and Spanish and reading the same to such person in English.

"You have the right to go to the superior, probate, and family, district or Boston municipal court if you reside within the appropriate jurisdiction, and file a complaint requesting any of the following applicable orders: *(a)* an order restraining your attacker from abusing you; *(b)* an order directing your attacker to leave your household; *(c)* an order awarding you custody of a minor child; *(d)* an order directing your attacker to pay support for you or any minor child in your custody if the attacker has a legal obligation to support them; and *(e)* an

order directing your attacker to pay you for losses suffered as a result of the abuse, including medical and moving expenses, loss of earnings or support, attorneys fees and other out-of-pocket losses for injuries sustained."

For an emergency on weekends, holidays or weeknights, you should contact the police, who will refer you to a justice of the superior, probate and family, district or Boston municipal court departments.

"You have the right to go to the appropriate district court or the Boston municipal court and seek a criminal complaint for threats, assault and battery, assault with a deadly weapon, assault with intent to kill or other related offenses.

"If you are in need of medical treatment, you have the right to request that the officer present drive you to the nearest hospital or otherwise assist you in obtaining medical treatment.

"If you believe that police protection is needed for your physical safety, you have the right to request that the officer present remain at the scene until you and your children can leave or until your safety is otherwise insured".

OPPOSITION

BRIEF

(2)

No. 85-1217

Supreme Court, U.S.
FILED
FEB 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

CITY OF SPRINGFIELD, MASSACHUSETTS,
PETITIONER,

v.

LOIS THURSTON KIBBE,
ADMINISTRATRIX OF THE ESTATE OF CLINTON THURSTON,
RESPONDENT.

Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Terry Scott Nagel
145 State Street
Suite 602
Springfield, Massachusetts 01103.
(413) 781-4342

25 pp

QUESTIONS PRESENTED

I. WHERE MUNICIPAL LIABILITY HAS BEEN IMPOSED PURSUANT TO 42 U.S.C. Sec. 1983 FOR GROSS NEGLIGENCE OR DELIBERATE INDIFFERENCE TO ADEQUATE POLICE TRAINING BY A JURY PROPERLY INSTRUCTED WITH REGARD TO THE SINGLE INCIDENT RULE, SHOULD CERTIORARI BE GRANTED TO CLARIFY THE MEANING OF "SINGLE INCIDENT"?

II. WHERE ONLY ONE OF TEN INDIVIDUAL POLICE DEFENDANTS IS HELD LIABLE FOR VIOLATIONS OF THE PLAINTIFF'S DECENDENT'S RIGHTS, DOES IMPOSITION OF MUNICIPAL LIABILITY CONFLICT WITH THE SINGLE INCIDENT RULE IN TUTTLE?

III. DOES THE DECISION BELOW CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS REGARDING THE MEANING OF "SINGLE INCIDENT" AND THE PERMISSIBLE INFERENCE TO BE DRAWN FROM EVIDENCE ON THE ISSUE OF INADEQUATE TRAINING?

TABLE OF CONTENTS

Questions Presented for Review.....i

Table of Authorities.....v

Statement of the Case.....1

Argument.....5

I. Where the Jury Have Been Correctly Instructed regarding the Standard of Proof for Imposition of Municipal Liability Under 42 U.S.C. Sec. 1983, it is not Appropriate to Grant Certiorari in Order to Promulgate a Legal Definition of "Single Incident" Under Tuttle.....6

II. The Decision Below Does Not Conflict with Decisions of the United States Supreme Court Regarding Municipal Liability Under 42 U.S.C. Sec. 1983.....10

III. The Decision in Kibbe conflicts with the Decisions in Other Circuits, Neither with Regard to What Constitutes a Single Incident, Nor With Regard to Inferential Proof of Inadequate Training.....13

Conclusion.....18

TABLE OF CASES

City of Oklahoma v. Tuttle,
105 S. Ct. 2427 (1985).... 7,8,10,11,13

Gilemere v. City of Atlanta,
737 F. 2d 894 (11th Cir. 1985)..... 15

Grandstaff v. City of Borger,
767 F. 2d 161 (5th Cir. 1985)..... 8

Kibbe v. City of Springfield,
777 F. 2d 801 (1st Cir. 1985).... 6,8,9,
10,11,12,13,14,15

Leite v. City of Providence,
463 F. Supp. 585 (D.R.I. 1978)..... 10

McClelland v. Facteau,
610 F. 2d 693 (10th Cir. 1980)..... 15

Monell v. Department of Social
Services, 436 U.S. 658 (1978)..... 5

Owens v. Haas, 610 F. 2d 1242
(2d Cir. 1979), cert. denied,
444 U.S. 980 (1979)..... 15

Pembauer v. City of Cincinnati,
746 F. 2d 337 (6th Cir. 1984)..... 14
Vippolis v. Village of Haverstraw,
768 F. 2d 40 (6th Cir. 1985)..... 12,15,
16,17
Voutour v. Vitale, 761 F. 2d 812
(1st Cir. 1985), cert. denied, slip op.
85-210 (1986)..... 7

NO. 85-1217

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CITY OF SPRINGFIELD, MASSACHUSETTS,

PETITIONER

V.

LOIS THURSTON KIBBE,

ADMINISTRATRIX OF THE ESTATE OF

CLINTON THURSTON,

RESPONDENT.

BRIEF IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

On the evening of September 29, 1981, Clinton Thurston was shot in the

head and killed by Springfield police officer Theodore Perry. Perry shot at Thurston twice from a moving motorcycle, missing with the first shot and placing a slug in the breezeway door of a nearby home. The occupant of that home reported running to her window after the shots were fired, and watching policemen beat Thurston with long objects after he had fallen from the car.

The shooting of Thurston followed a lengthy pursuit of Thurston by a large number of Springfield police officers that began when Officer Eric Risch responded to a police radio transmission saying Thurston had broken open a door at 77 Beacon Circle and forced his girlfriend to go with him in his car. Risch, wearing a red windbreaker and driving an unmarked car, approached Thurston's car at an intersection, but

Thurston drove off. Two other police officers set up a roadblock in Thurston's path. As Thurston drove by at 25 miles per hour, both officers brandished their firearms, and one of them fired at Thurston. That officer disposed of his spent ammunition before presenting his gun for inspection.

After the incident at the first roadblock, the dispatcher, in the presence of the commanding officer for the watch, broadcast a message to all cars that Thurston was no longer wanted only for violation of a restraining order, but also assault by means of a vehicle. Two more police officers set up a second roadblock, one of whom decided to shoot to kill if he could get a clear shot. Although he could see Thurston's girlfriend sitting in the passenger seat, he fired at Thurston's car, and then he,

too, disposed of his spent cartridge .

At this juncture, Officer Perry gave chase on his motorcycle, passing a number of police cruisers to pull up alongside Thurston and fire two shots at him. When the fatal bullet hit Thurston, his vehicle rolled to a stop and Eric Risch struck Thurston in the head with a flashlight. At trial, Schaub testified that the unconscious Thurston was resisting arrest in that he had not yet surrendered his person to a police officer.

Although doctors at the hospital where Thurston was taken inquired repeatedly whether Thurston might have suffered a gunshot wound, the police who transported Thurston were unable to provide any information in that regard. None of the police officers who discharged firearms during the chase

reported doing so until after a bullet was located on an x-ray film. Thurston died of the wound.

ARGUMENT

The Petitioner City of Springfield puts forward three reasons why the it believes that a grant of certiorari is appropriate in this case. The City asserts that this case provides an opportunity to refine the precepts laid down in Monell v. Department of Social Services, 436 U.S. 658 (1978); that the decision below conflicts with prior decisions of the United States Supreme Court; and that this case presents a conflict with cases from other circuits. On appeal to the First Circuit in this matter, the City sought review of the factual adequacy of the plaintiff's

proof. Kibbe v. City of Springfield, 777 F. 2d 801 (1st Cir. 1985). In arguing the above grounds for grant of a writ of certiorari, the City seeks to have the Supreme Court overturn the findings of fact made by the jury in order to arrive at an interpretation of the case which permits the conclusion that any of the above issues is presented in a manner appropriate for review by the United States Supreme Court.

I. WHERE THE JURY HAVE BEEN CORRECTLY INSTRUCTED REGARDING THE STANDARD OF PROOF FOR IMPOSITION OF MUNICIPAL LIABILITY UNDER 42 U.S.C. Sec. 1983, IT IS NOT APPROPRIATE TO GRANT CERTIORARI IN ORDER TO PROMULGATE A LEGAL DEFINITION OF "SINGLE INCIDENT" UNDER TUTTLE.

The City's Petition was filed before the recent action of the Court denying

certiorari in another First Circuit case, Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985), cert. denied, slip op. 85-210 (1986). In that case, the only basis of liability which remained viable as to the Town of Saugus after review in the Court of Appeals was the failure by the municipality to adequately train its police officers. Denial of certiorari in that case indicates that failure to train remains a viable basis of relief following City of Oklahoma v. Tuttle, 105 S. Ct. 2427 (1985) notwithstanding the ambivalence articulated in footnote 7 of the plurality opinion in that decision. Id. at 2436, n.7.

The main thrust of the City's argument is that the First and Fifth Circuits have sought to circumvent Tuttle by carving out an exception to the single incident rule. In Part II of the City's

petition, essentially the same argument is made in the form of an assertion that the single incident rule has been limited to a "'one officer, one shot' interpretation." Petition, p.11. This argument misstates the rationale of the First Circuit's opinion, and attempts to cut away the considerable middle ground which lies between the kind of "single incident" upon which the jury could have based its finding of liability under the erroneous instruction in Tuttle, and the lengthy train of events which gave rise to the claims in both this case and Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985).

In Kibbe, although Tuttle had not yet been decided, the trial court correctly instructed the jury regarding the single incident rule: "An incident of excessive force on the part of the police officers

standing by itself , is insufficient to find the City of Springfield liable under Section 1983. A governmental body can be found responsible for the deprivation of a person's civil rights if the actions taken by its employees, are in accordance with a custom or practice of the government and those actions caused the deprivation of the person's rights." Kibbe, 777 F. 2d at 809. On the basis of this instruction and the evidence before it, the jury concluded that the abuses complained of did not constitute a single incident. Such a determination should be left to the finder of fact, and does not lend itself to the formulation of a brightline definition.

The City also urges the adoption of a rule precluding inferential proof of inadequate training, and imposition of a requirement that Section 1983 plaintiffs

demonstrate a pattern of prior misconduct in order to recover under a failure to train theory. There is no authority for the proposition that ordinarily permissible inferences may not be drawn in civil rights cases, and a blanket requirement that proof of inadequate training be made in every instance through experts would be irrational. The Kibbe court clearly believed that some cases of inadequate training are so patent as to require no expert testimony. Kibbe, 777 F. 2d at 804. Imposition of a requirement that plaintiffs prove a prior pattern of misconduct runs counter to the purposes of the statute. Leite v. City of Providence, 463 F. Supp. 585, 590 (D.R.I. 1978); City of Oklahoma v. Tuttle, 105 S. Ct. 2427, 2441 (1985)(Brennan, J., concurring).

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT REGARDING THE MUNICIPAL LIABILITY UNDER 42 U.S.C. Sec. 1983.

The City purports to detect a conflict between Tuttle and Kibbe through a strained interpretation of the latter decision, arguing that the jury's decision to give judgment against only one of the four individual police officer defendants under Sec. 1983 renders irrelevant the bulk of evidentiary matters which the First Circuit relied upon in finding adequate proof of municipal liability. The events leading to the death of Kibbe's decedant involved "at least ten officers and three separate shooting incidents, in which three different officers fired their weapons." Kibbe, 777 F. 2d at 805. The City would

excise this evidence from the case, and read Kibbe as laying down a "one officer, one shot" interpretation of the single incident rule. Petition, p.11.

Kibbe stands for no such rule. At a minimum, it is undisputed that Perry, the officer against whom judgment was rendered individually, fired more than "one shot." Kibbe, 777 F. 2d at 803; Petition, p.4. Much more significantly, the jury's decision not to render judgment against the other three named police officers is not inconsistent with a determination that they denied Thurston his constitutional rights as a result of inadequate training, since the individual defendants had available the defense of qualified immunity which was, of course, unavailable to the City. cf. Vippolis v. Village of Haverstraw, 768 F. 2d 40, 43 (2d Cir. 1985). Accordingly, their

conduct, as well as the conduct of police officers against whom the plaintiff voluntarily dismissed the action at the outset of trial and those who were never named as defendants, was the proper subject of the jury's consideration in deciding whether the injury to Thurston arose from a "single incident."

III. THE DECISION IN KIBBE CONFLICTS WITH THE DECISIONS IN OTHER CIRCUITS, NEITHER WITH REGARD TO WHAT CONSTITUTES A SINGLE INCIDENT, NOR WITH REGARD TO INFERENTIAL PROOF OF INADEQUATE TRAINING.

The City cites a number of pre-Tuttle cases in an effort to demonstrate a conflict in the Circuits with regard to the definition of a single incident. The cases cited differ dramatically from Kibbe, in that they all arise from fact patterns circumscribed in time and

location. Furthermore, in most of the cases the Court of Appeals was not focusing upon the isolated nature of the incident as the single dispositive issue.

Pembauer was not, in point of fact, before the Sixth Circuit for review of a claim of inadequate training. Rather, the section of the case referred to by the petitioner here deals with the inadequacy of an isolated policy decision as evidence of municipal custom or policy. Pembauer v. City of Cincinnati, 746 F. 2d 337, 341 (6th Cir. 1984). Even were the case not inapposite, the sheriff and district attorney's authorization of a single illegal forced entry by a group of deputy sheriffs and policemen in Pembauer bears no factual similarity to the conduct at issue in Kibbe. In Gilmere, the Circuit Court rejected gross negligence and deliberate indifference as

the standard of proof in failure to train cases. Gilmere v. City of Atlanta, 737 F. 2d 894, 903 (11th Cir. 1985). It also held an as alternative ground of decision that an arrest by two officers at the decedent's door, followed by a shooting during the scuffle which erupted as the police tried to place him in a nearby police car, constituted an isolated incident. Id. at 904.

McClelland and Owens, too, present factual situations which fail to demonstrate the kind of widespread conduct, sustained over time and carried out by independent actors at various locations, seen in the Kibbe facts. McClelland v. Facteau, 610 F. 2d 693 (10th Cir. 1980); Owens v. Haas, 610 F. 2d 1242 (2d Cir. 1979), cert. denied, 444 U.S. 980 (1979).

The putative conflict between Kibbe

and Vippolis is likewise illusory. The City puts forward the proposition that inferential proof of a gross negligence or deliberate indifference to adequate training is inconsistent with the holding in Vippolis v. Village of Haverstraw, 768 F. 2d 40 (2d Cir. 1985). In Vippolis, the sole proof offered on that issue by the plaintiff was in the form of evidence demonstrating that one police officer had been hired without having completed a statutorily required training program. Id. at 44. No proof was offered regarding the training actually received by the officer in question, and such evidence was in fact excluded as a result of Plaintiff's objections during cross examination. Id. at 42. The Second Circuit held that this provided an inadequate basis for drawing the inference that the municipality had been

grossly negligent or deliberately indifferent with respect to training. Id. at 44.

The proof in the instant case bears no relationship to the narrow issue presented by Vippolis. The widespread activity of the Springfield Police over the course of the evening leading up to Thurston's death placed before the finder of fact copious evidence of inadequate departmental procedures for insuring that police officers were adequately trained in the use of handguns, police officers' misapprehension of basic law and law enforcement techniques, the absence of accountability for the use of weapons, and needless resort to deadly force "whenever it was technically permitted by the rules, even though something less would have sufficed." Kibbe, 777 F. 2d at 808. Nothing in Vippolis forbids a

finder of fact from drawing reasonable inferences from such a quantity of evidence.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully Submitted,

Terry Scott Nagel
145 State St.
Suite 602
Springfield, MA 01103
(413) 781-4342

JOINT

APPENDIX

Supreme Court, U.S.
FILED
MAY 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1217.

In the Supreme Court of the United States.

OCTOBER TERM, 1985.

CITY OF SPRINGFIELD, MASSACHUSETTS,
PETITIONER,

v.

LOIS THURSTON KIBBE, ADMINISTRATRIX OF
THE ESTATE OF CLINTON THURSTON,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Joint Appendix.

RICHARD T. EGAN,
Counsel of Record,
City Solicitor,
HARRY P. CARROLL,
Deputy City Solicitor,
EDWARD M. PIKULA,
Assistant City Solicitor,
SUSAN J. MCFARLIN,
Staff Attorney,
DAVID G. SOUTHCOTTE, Clerk,
Law Department,
City of Springfield,
36 Court Street,
Springfield, Massachusetts 01103.
(413) 787-6085

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

246 pp

Table of Contents.

Relevant Docket entries	1
Complaint	8
Defendants' answer	22
Defendant City of Springfield's motion for a directed verdict	26
Defendant City of Springfield's request for jury instruction	28
Judgment by District Court	39
Defendant City of Springfield's motion for judgment notwithstanding the verdict	41
Memorandum and order	43
Notice of appeal	48
Exhibit No. 7 Rules and regulations of the Springfield Police Department	49
Relevant portions of transcript	165

Relevant Docket Entries

Date	NR.	PROCEEDINGS
1982		
August 10	1	COMPLAINT filed.
	2	P's Req. for Production filed; CS.
	3	P's Ints. to Def. City of Springfield filed; CS.
September 17	4	DS' ANSWER filed w/demand for J/T.
	5	DISCOVERY ORDER entered by the Court; cc/cl.
September 21	6	Def. City of Springfield's Response to Req. for Production filed.
November 23	7	P's Req. for Notice of Delinquency.
November 26	8	Notice of Delinquency issued to Def. City of Springfield; cc/cl.
December 22	9	Def. City of Springfield's Motion for Extension of Time to Ans. Int. to 2/14/83 filed; CS.
1983		
January 4		FREEDMAN, J. #09 ALLOWED; cc/cl.
February 18	10	P's Request for Notice of Delinquency filed.
February 22	11	Notice of Delinquency issued to Def. City of Springfield; cc/cl.
April 22	12	P's Motion to Compel Answers to Intgs. filed. CS
May 4	13	D's Motion for Extension of Time for Filing Answers to P's Int's.
May 11	14	Opposition to D's Motion to Extend Time to File Ans. to Int. cs.
July 13		FREEDMAN, J. #12 "ALLOWED. Defendant is ordered to answer interrogatory within thirty days . . ." cc/cl.

Date	NR.	PROCEEDINGS
1983		
August 19	15	D's Ans. to P's Ints. filed; CS.
August 25	16	P's Motion to Enlarge Discovery 6 mos. filed; CS.
September 8		FREEDMAN, J. #16 ALLOWED; no further extensions. . .cc/cl.
September 14	17	P's Ints. to Def. Perry filed; CS.
	18	P's Ints. to Def. Lussier filed; CS.
	19	P's Ints. to Def. Rondeau filed; CS.
	20	P's Ints. to Def. Kupras filed;
	21	P's Ints. to Def. Frank Daigneau filed; CS.
	22	P's Ints. to Def. Giles Daigneau filed; CS.
	23	P's Ints. to Def. Eric Risch filed; CS.
	24	P's Ints. to Def. Reigner filed; CS.
	25	P's Ints. to Def. Schaub filed; CS.
	26	P's Ints. to Def. Troy filed; CS.
	27	P's Motion to Compel Further Ans. to Ints. by Def. City of Springfield filed: CS.
November 16	28	P's Req. for Notice of Delinquency.
	29	Notice of Delinquency issued to 10 individual Ds.; cc/cl.
1984		
January 6	30	P's Motion to Compel Ans. to Ints. by individual police Ds. filed;
January 23		FREEDMAN, J. #30 "ALLOWED. Defendants are ordered to answer interrogatories within 20 days. . ." cc/cl.
March 26	31	Def. Daigneau's Ans. to Ints. filed; CS.
	32	Def. Troy's Ans. to Ints. filed; CS.
	33	Def. Schaub's Ans. to Ints. filed; CS.
	34	Def. Giles Daigneau's Ans. to Ints. filed; CS.

Date	NR.	PROCEEDINGS
1984		
	35	Def. Kupras' Ans. to Ints. filed; CS.
	36	Def. Reigner's Ans. to Ints. filed; CS.
	37	Def. Rondeau's Ans. to Ints. filed; CS.
	38	Def. Lussier's Ans. to Ints. filed; CS.
June 7	39	P's Motion to Compel Def. Perry to Ans. Ints. filed; CS. Suppl. Ans. to Ints. filed by:
	40	Def. Reigner; CS.
	41	Def. Rondeau; CS.
	42	Def. Kupras; CS.
	43	Def. Daigneau; CS.
	44	Def. Lussier; CS.
	45	Def. Troy; CS.
	46	Def. Schaub; CS.
	47	Def. Giles Daigneau; CS.
June 11	48	Def. Perry's Ans. to Ints. filed; CS.
August 20	49	Withdrawal of Appearance of Terry Nagel for Pl. filed; CS.
August 21		Notice of pre-trial conference on 9/24/84 sent to counsel.
September 24	50	P's pre-trial memo filed.
	51	D's Pre-trial memo filed.
		FREEDMAN, J. Counsel present for pre-trial conference. Number of defendants to be reduced by counsel. Ready for trial. Trial date 11/13/84 established.
November 13	52	Appearance of Kevin B. Coyle for the Defendants Eric Risch, John Troy, and Kenneth Schaub filed.
	53	Ds' Motion for a Jury View filed.
		1st Day Counsel and parties present for Jury Trial. Pltf. dismisses w/prejudice as to Defts. Reigner, Giles Daigeneau, Frank Daige-

Date	NR.	PROCEEDINGS
1984		
		neau, Kupas, Rondeau, Lussier, and other unknown officers, leaving the City of Springfield, Perry, Troy, Schaub, and Risch as Defendants. Court and Jury go on view of scene after Counsel's opening statements as to the view. After the view, Counsel's opening arguments. Ps' evidence begins. Court recesses at 4:20 P.M. until 10:00 A.M.
November 14		2nd Day P's evidence continues. Court recesses at 4:15 P.M. until 10:00 A.M. 15/84. (Philbin.)
November 15		3rd Day. Ps' evidence continues. Court recesses at 3:35 P.M. until 10:00 A.M. 11/16/84. (Zommermand)
November 16		4th Day. Ps' evidence continues. Pltf rests. D's move for directed verdict Court directs verdict as to conscious suffering. The Court strikes conspiracy acts re: 1985 claims. Deft Perry's evidence begins. Afternoon recess. Court directs verdict as wrongful death statutes as to Defts. Risch, Troy, and Schaub and dismiss w/prejudice. The wrongful death claims as to the City of Springfield. Court recesses at 3:35 P.M. until 9:30 A.M., 11/19/84. (Zommerman)
November 16		54 Motion of the Defendant John Troy for Directed Verdict filed.
		55 Motion of the Def. Eric Risch for Directed Verdict filed.
		56 Motion of the Def. Kenneth Schaub for Directed Verdict filed.

Date	NR.	PROCEEDINGS
1984		
		58 Ds' Risch, Troy, and Schaub's Req. for Jury Instructions filed.
		59 Ps' Req. for Instructions to the Jury filed.
		60 Ds' Theodore Perry's Req. for Jury Instructions filed.
		61 Ds' City of Springfield Req. for Jury Instructions filed.
November 19		5th Day. Deft. Perry's evidence continues. Deft. rests. Defts. Risch, Schaub and Troy rest. Deft. City of Springfield rests. Pltfs. rests. Closing arguments of Counsel. Court recesses for lunch. Court's instructions on the law. Counsel's objections to Court instructions. Jury begins deliberation at 2:45. Jury deliver written question in Court at 4:30 P.M. Court returns answer in writing. Court releases jury at 5:45 P.M. Deliberation to resume at 9:30 A.M. 11/20/84. (Zommermand & Philbin)
November 20		6th Day. Jury resumes deliberations at 9:30 A.M. Court orders lunch for jury 12:00 P.M. Court re-instructs jury at 12:50 P.M. re: questions of jury return at 12:25 P.M. Court re-instructs jury at 3:00 P.M. on questions returned by at 2:45 P.M. Jury returns verdicts at 4:00 P.M. Jury finds Defts. Risch, Schaub, and Troy not liable for violations under 42 U.S. 1983. Jury finds Deft. Perry not liable for violations under wrongful death statute. Jury finds Deft. Perry liable for civil rights violations under 42 1983 and awards com

Date	NR.	PROCEEDINGS
1984		
		pensatory damages in the amount of $1.00 and punitive damage in the amount of $500.00. Jury finds Deft. City of Springfield liable for city rights violations under 42 USC 1983 and awards compensatory damages in the amount of $50,000.00. Jury released. Exhibit 12 (gun) returned to Attorney Gordon.
November 23	62	JUDGMENT ENTERED. cc/cl
November 29	63	Def. Theodore Perry's Motion for Judgment notwithstanding the Verdict filed;
	64	Def. City of Springfield's, Motion for Judgment notwithstanding the Verdict
	65	D's Memorandum of Law in Support of #64 filed; CS.
December 12	66	P's Resistance of #63 filed; CS.
	67	P's Resistance to #64 filed; CS.
December 19		Hearing on Defendants Perry and City of Springfield Motions for judgment notwithstanding the verdict. After hearing the Court takes the Motions under advisement.
December 21	68	FREEDMAN, J. Memorandum and Order entered.
1985		
January 4	69	P's Motion for Reconsideration of Order for New Trial filed; CS.
	70	P's Motion for Continuance to February Trial Date filed; CS.
	71	P's Notice of Appeal filed; CS.
January 9		FREEDMAN, J. Hearing on P's Motion for Reconsideration of Order for New Trial

Date	NR.	PROCEEDINGS
1985		
		Court reconsiders Order and orders that Motions for Judgment notwithstanding the verdict still be denied. Order for New Trial is withdrawn. Pltf. withdraws Notice of Appeal. (Philbin) The original verdicts of the Jury ordered recorded.
January 17	72	Notice of Appeal of City of Springfield filed. Fee paid.
	73	Notice of Appeal of Theodore Perry filed.
January 22		Original Docket and Pleadings forwarded to Appeals Clerk, Boston

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

LOIS THURSTON KIBBE, Administratrix
of the Estate of CLINTON H. THURSTON,
Deceased, as Administratrix,
Plaintiff,

v COMPLAINT

CITY OF SPRINGFIELD and
THEODORE PERRY, JOHN TROY, KENNETH SCHAUB,
JOHN REIGNER, ERIC RISCH, GILES DAIGNEAU,
FRANK DAIGNEAU, CHARLES KUPRAS, THOMAS
RONDEAU, FRANCIS LUSSIEP, and OTHER UNKNOWN
SPRINGFIELD POLICE OFFICERS, individually
and in their official capacities,
Defendants.

PRELIMINARY STATEMENT

This is an action authorized by Title 42, Sections 1983 et seq. of the United States Code, brought to redress the deprivation, by persons acting under color of state law, of the basic civil and constitutional rights of Plaintiff's decedent; and further, as pendant state claims, to recover damages for both the conscious suffering and the unlawfully caused death of Plaintiff's decedent, and for deprivation of his civil and constitutional rights protected by M.G.L. c 12 § 11 I.

The Plaintiff seeks declaratory and injunctive relief, together with compensatory and punitive damages for the actions of the individual Defendants, who, being inadequately trained and inadequately regulated by official policy or regulation, shot, beat and denied adequate medical care to Clinton H. Thurston, all without legal or just cause.

The Plaintiff further seeks declaratory and injunctive relief, together with compensatory and punitive relief from the Defendant, City of Springfield, which failed to adequately train, regulate and equip the individual defendants.

JURISDICTION

1. This action is brought pursuant to 42 U.S.C. Sections 1983, 1985 (2) & (3), 1986 and 1988, and the Fourth, Fifth, Eighth, and Fourteenth Amendments. Jurisdiction is founded on 28 U.S.C. Sections 1331 and 1343 (1) — (4) and the aforementioned statutory and constitutional provisions. The Plaintiff further invokes the pendant jurisdiction of this Court to consider claims arising under state law.

2. The amount in controversy exclusive of interests and costs exceeds the sum of $10,000.

3. This Court is the proper venue for this action by virtue of Title 28, § 1391 (b) of the United States Code.

PARTIES

4. Plaintiff Lois Thurston Kibbe is a citizen of the United States and a resident of Springfield, Massachusetts. She is Administratrix of the Estate of Clinton H. Thurston. Letters of Administration were granted to her by the Honorable Frank Placzek of the Hampden County Probate Court on December 11, 1982, a copy of which is appended hereto as Exhibit A.

5. The Plaintiff's decedent was, at the time of his death, a 47 year old citizen of the United States and a resident of Springfield, Massachusetts.

6. Defendant City of Springfield is a municipality incorporated under the laws of the Commonwealth of Massachusetts, and at all times relevant hereto employed the Defendants, Theodore Perry, John Troy, Kenneth Schaub, John Reigner,

Eric Risch, Giles Daigneau, Frank Daigneau, Charles Kupras, Thomas Rondeau, and Francis Lussier as police officers.

7. Defendant Theodore Perry, at all times relevant hereto, was a member of the Police Department of the City of Springfield and at all times was acting in such capacity as the agent, servant, and employee of the Defendant City of Springfield. He is sued individually and in his official capacity.

8. Defendant John Troy, at all times relevant hereto, was a member of the Police Department of the City of Springfield and at all times was acting in such capacity as the agent, servant, and employee of the Defendant City of Springfield. He is sued individually and in his official capacity.

9. Defendant Kenneth Schaub, at all times relevant hereto, was a member of the Police Department of the City of Springfield and at all times was acting in such capacity as agent servant, and employee of the Defendant City of Springfield. He is sued individually and in his official capacity.

10. Defendant John Reigner, at all times relevant hereto, was a member of the Police Department of the City of Springfield and at all times was acting in such capacity as agent, servant, and employee of the Defendant City of Springfield. He is sued individually and in his official capacity.

11. Defendant Eric Risch, at all times relevant hereto, was a member of the Police Department of the City of Springfield and at all times was acting in such capacity as agent, servant, and employee of the Defendant City of Springfield. He is sued individually and in his official capacity.

12. Defendant Giles Daigneau, at all times relevant hereto was a member of the Police Department of the City of Springfield and at all times was acting in such capacity as agent, servant, and employee of the Defendant City of Springfield. He is sued individually and in his official capacity.

13. Defendant Frank Daigneau, at all times relevant hereto, was a member of the Police Department of the City of Springfield and at all times was acting in such capacity as agent, servant, and employee of the Defendant City of Springfield. He is sued individually and in his official capacity.

14. Defendant Charles Kupras, at all times relevant hereto, was a member of the Police Department of the City of Springfield and at all times was acting in such capacity as agent, servant, and employee of the Defendant City of Springfield. He is sued individually and in his official capacity.

15. Defendant Thomas Rondeau, at all times relevant hereto, was a member of the Police Department of the City of Springfield and at all times was acting in such capacity as agent, servant and employee of the Defendant City of Springfield. He is sued individually and in his official capacity.

16. Defendant Francis J. Lussier, at all times relevant hereto, was a member of the Police Department of the City of Springfield and at all times was acting in such capacity as agent, servant and employee of the Defendant City of Springfield. He is sued individually and in his official capacity.

17. At all times relevant hereto and in all their actions described herein, the individual Defendants, Theodore Perry, John Troy, Kenneth Schaub, John Reigner, Eric Risch, Giles Daigneau, Frank Daigneau, Charles Kupras, Thomas Rondeau, and Francis J. Lussier were acting under color of law and pursuant to their authority as police officers.

FACTS

18. On the evening of September 28, 1981, the Springfield police received a telephone call from Sandra Gunther reporting that Clinton H. Thurston had forced in the door at 77 Beacon Circle and had forced Pamela Etter to leave with him in an automobile.

19. At the time of the call from Sandra Gunther, the Springfield police department had been informed of a Restraining

Order in effect against Clinton H. Thurston and obtained by Pamela Etter.

20. Clinton H. Thurston was stopped by Officer Eric Risch, shortly after the aforementioned telephone call, at the intersection of Boston Road and Breckwood Boulevard, but drove off without acknowledging the presence of Risch when Risch approached his driver's side window.

21. Officer Eric Risch engaged in the chase of Clinton H. Thurston after Thurston departed from the initial stop at the intersection of Boston Road and Breckwood Boulevard.

22. Officers John Troy and Giles Daigneau, who were assigned to the same police cruiser, and Officer Charles Kupras, who was assigned to motorcycle duty, set up a roadblock at the intersection of Memorial Drive and Roosevelt Avenue in order to apprehend Clinton H. Thurston following his departure from the intersection of Breckwood Boulevard and Boston Road.

23. The car driven by Clinton H. Thurston was being pursued by several police cruisers as it approached the roadblock at Memorial Drive and Roosevelt Avenue.

24. Officers John Troy and Giles Daigneau drew and brandished their service revolvers preparatory to the approach of the Thurston vehicle.

25. Officer John Troy was aware of an additional person in the Thurston vehicle as it passed through the roadblock.

26. Officer John Troy fired his service revolver at the Thurston vehicle as it passed through the roadblock at 25 to 30 miles per hour.

27. The shot fired at the Thurston vehicle was without just or legal cause, as Clinton H. Thurston's actions constituted no serious danger to the police officers present.

28. The shot fired at the Thurston vehicle constituted an unjustified assault on Clinton H. Thurston which Officer John Troy should reasonably have known would make it less likely

that Clinton H. Thurston would stop willingly and turn himself over to his pursuers.

29. At some point subsequent to firing at the Thurston vehicle, Officer John Troy disposed of at least one spent cartridge from his service revolver.

30. Officer John Troy's actions in disposing of at least one spent cartridge from his service revolver rendered an adequate ballistics analysis of responsibility for all shots fired at Clinton H. Thurston on the evening in question impossible.

31. At the time Officer John Troy fired at the Thurston vehicle, he did not fear for his personal safety.

32. Subsequent to the time Clinton H. Thurston passed through the roadblock at Memorial Drive and Roosevelt Avenue, a Springfield Police Officer stated over the police radio: "He just attempted to run over a police officer. This is not only a violation of restraining order, this is assault by means of a vehicle." The police officer making this transmission knew or should have known that it would increase the level and likelihood of the use of deadly force against Clinton H. Thurston.

33. On the evening in question, Officer Kenneth Schaub, who was assigned alone to a cruiser, and Officer Theodore Perry, who was assigned to motorcycle duty, set up a roadblock at Roosevelt Avenue and Bay Street.

34. Clinton H. Thurston did not stop for the aforementioned roadblock.

35. Officer Kenneth Schaub, at that time, fired at least one shot at the Thurston vehicle without just or legal cause, as Clinton Thurston's actions at that time constituted no serious danger to the officers present.

36. The shot fired by Officer Kenneth Schaub constituted an assault upon Clinton H. Thurston which Officer Kenneth Schaub should reasonably have known would make it less likely that Clinton H. Thurston would stop willingly and turn himself over to his pursuers.

37. After Clinton H. Thurston failed to stop for the roadblock at Roosevelt Avenue and Bay Street, Officers Kenneth Schaub and Theodore Perry joined in the pursuit of the Thurston vehicle.

38. In the course of the pursuit, Officer Theodore Perry, willfully, maliciously, intentionally, and in violation of Springfield Police regulations, fired his service revolver twice at the vehicle driven by Clinton H. Thurston.

39. The slug from one shot fired by Officer Theodore Perry struck Clinton H. Thurston in the head and passed through his brain, causing him grievous bodily harm and loss of life.

40. After the vehicle driven by Clinton H. Thurston rolled to a stop, Officer Eric Risch struck Clinton H. Thurston on the head with his flashlight through the open window of the vehicle.

41. The striking of Clinton H. Thurston by Officer Eric Risch was without just or legal cause, in that Thurston was not at the time attempting to escape and was, in fact, totally surrounded by approximately fifteen police cars.

42. Individual Defendants Theodore Perry, John Troy, Kenneth Schaub, John Reigner, Eric Risch, Giles Daigneau, Frank Daigneau, Charles Kupras, Thomas Rondeau, and Francis Lussier, as well as numerous other Springfield Police Officers whose identity is unknown to the Plaintiff, were present near the intersection of Roosevelt Avenue and Roosevelt Terrace where Clinton H. Thurston was apprehended.

43. At least four of the police officers present dragged Clinton H. Thurston from the vehicle he was driving and beat him with nightsticks or flashlights, such beating being without just or legal cause as Thurston was, at this time, incapable of any resistance.

44. No police officer present during the beating of Clinton H. Thurston came to his aid or attempted in any way to intervene and prevent his fellow officers from unjustifiably or

illegally inflicting further injuries on the person of Clinton H. Thurston.

45. Following the apprehension of Clinton H. Thurston, neither Lt. Thomas Rondeau, as the Street Supervisor present, nor any other police officer present arranged within a reasonable amount of time for Clinton H. Thurston's transportation to a place where medical treatment could be obtained.

46. The Plaintiff alleges that in violation of Springfield Police Department regulations, no officer who discharged a firearm during the chase and apprehension of Clinton H. Thurston reported doing so promptly to a superior officer; in the alternative, the Plaintiff alleges that no superior officer who was promptly informed of the discharge of a firearm during the chase and apprehension of Clinton H. Thurston made a timely notification of that fact to the medical personnel treating Clinton H. Thurston's injuries.

47. As a result of the failure of police personnel to report the possibility of a gunshot wound to medical personnel promptly, it was not determined that Clinton H. Thurston had received a gunshot wound to the head until an unreasonably dangerous amount of time had passed.

48. Officer John Reigner responded in the negative three times to inquiries by medical personnel when asked if it were possible that Clinton H. Thurston was suffering from a gunshot wound to the head.

FIRST CAUSE OF ACTION

49. The allegations set forth in paragraphs 1 through 48 are incorporated herein as if fully set forth.

50. As a direct and proximate result of the above described unlawful and malicious acts of individual Defendants Theodore Perry, John Troy, Kenneth Schaub, John Reigner, Eric Risch, Giles Daigneau, Frank Daigneau, Charles Kupras, Thomas

Rondeau, and Francis Lussier, as well as the acts of other Springfield Police Officers whose names are not known to the Plaintiff, all committed under the color of their authority as Springfield Police Officers, Clinton H. Thurston suffered grievous bodily harm and loss of life, all of which is in violation of his rights under the laws of the Constitution of the United States, in particular, the Fourth, Fifth, Eighth and Fourteenth Amendments thereof, and 42 U.S.C. §§ 1983, 1985 (2) & (3), and § 1988.

51. Clinton H. Thurston was a victim of summary execution at the hands of Defendant Police Officer Theodore Perry. The punishment administered was grossly disproportionate to whatever Clinton H. Thurston's acts may have been, constituted cruel and unusual punishment, and deprived him of his right to due process of law under the laws and the Constitution of the United States, in particular, the Fourth, Eighth and Fourteenth Amendments thereof. The shooting of Clinton H. Thurston was cruel, unwarranted, inhuman, unjustifiable, and excessive.

52. As a further result of the acts described above, Clinton H. Thurston was deprived of the rights and immunities secured to him under the Constitution and laws of the United States and of the Commonwealth of Massachusetts, including, but not limited to, his right under the Fourteenth Amendment to be secure in his person, to be free from punishment without due process, and to equal protection of the laws.

53. The failure of the Defendant City of Springfield to provide training and supervision regarding the lawful use of an officer's service revolver, and the failure to provide adequate communications equipment for motorcycle officers engaged in vehicular chases, amounts to gross negligence and a deliberate indifference to the lives of the citizens of Springfield. This gross negligence was a proximate cause of the death of the Plaintiff's decedent.

54. Defendant City of Springfield is directly liable and responsible for the acts of the individual named defendants in this case because it has knowingly and repeatedly failed to enforce the laws of the Commonwealth of Massachusetts and the regulations of the Springfield Police Department, thereby creating within the Springfield Police Department an atmosphere of lawlessness in which police officers employ excessive and illegal force and violence, including deadly force, in the belief that such acts will be condoned and justified by their superiors. The Defendant City of Springfield therefore knew or should have known of such unlawful acts prior to and at the time of Clinton H. Thurston's killing.

SECOND CAUSE OF ACTION

55. The allegations set forth in paragraphs 1 through 48 and paragraphs 50 through 52 are incorporated herein as if fully set forth.

56. As a direct and proximate result of the above described unlawful and malicious acts of individual Defendants Theodore Perry, John Troy, Kenneth Schaub, John Reigner, Eric Risch, Giles Daigneau, Frank Daigneau, Charles Kupras, Thomas Rondeau, and Francis Lussier, as well as the acts of other Springfield Police Officers whose names are not known to the Plaintiff, Clinton H. Thurston suffered grievous bodily harm and loss of life, all of which is in violation of M.G.L. c. 12, § 11 I.

THIRD CAUSE OF ACTION
COUNT I
Conscious Suffering

57. The allegations set forth in paragraphs 1 through 56 are incorporated herein as if fully set forth.

58. As a direct and proximate result of the above described unlawful and malicious acts of individual Defendants Theodore Perry, John Troy, Kenneth Schaub, John Reigner, Eric Risch, Giles Daigneau, Frank Daigneau, Charles Kupras, Thomas Rondeau, and Francis Lussier, as well as the acts of other Springfield Police Officers whose names are not known to the Plaintiff, Plaintiff's decedent, Clinton H. Thurston, suffered great pain of body and anguish of mind for a long period of time, and incurred large expenses for medical care and attendance, and thereafter died at 9:24 p.m. on September 28, 1981.

59. This count is for conscious suffering and is brought for the benefit of the Estate of Clinton H. Thurston.

WRONGFUL DEATH
COUNT II

60. This count is for Wrongful Death, brought by the Plaintiff Administratrix for the use of the next of kin of Clinton H. Thurston, pursuant to M.G.L. c. 22A § 2.

61. The allegations set forth in paragraphs 1 through 56 are incorporated herein as if fully set forth.

62. The allegations contained in paragraph 58 is incorporated herein as if fully set forth.

WHEREFORE, Plaintiff prays for the following relief:

1. A declaratory judgment that Defendants' actions deprived the Plaintiff's decedent, Clinton H. Thurston, of his rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and under the Declaration of Rights of the laws of the Commonwealth of Massachusetts.

2. A preliminary and permanent injunction preventing the Defendant City of Springfield from employing Theodore Perry, John Troy, and Kenneth Schaub in any capacity in which they would carry firearms.

3. Judgment for compensatory damages against all the Defendants, jointly and severally, in favor of the Plaintiff, Lois Thurston Kibbe in the amount of $1,500,000.00.

4. Judgment for punitive damages against all the Defendants, jointly and severally, and in favor of Plaintiff Lois Thurston Kibbe, in the amount of $1,500,000.00.

5. The costs of this action including reasonable attorney fees as authorized by Title 42, §§ 1988 et seq of the United States Code, and by M.G.L. c. 12, § 11 I.

6. Such other and further relief as the Court deems appropriate and just in the circumstances.

PLAINTIFF DEMANDS A JURY TRIAL.

Respectfully submitted,

LOIS THURSTON KIBBE, Plaintiff

By /s/_____
Efrem A. Gordon

/s/ _____
Terry Nagel
Counsel for Plaintiff
83 State Street
Springfield, MA 01103
(413) 737-4316

COMMONWEALTH OF MASSACHUSETTS
Hampden, ss. TO THE PROBATE COURT:
DOCKET NO._____
ADMINISTRATION WITH SURETIES

Name of Decedent Clinton Harold Thurston
Domicile at Death 723 Belmont Avenue Springfield Hampden
(street and no.) (city or town) (county)
Date of Death September 28, 1981
Name and address of Petitioner Lois Kibbe Thurston Kibbe
58 Roosevelt Terrace
Springfield, MA

Status _____

Heirs at law or next of kin of deceased:

Name	Residence (minors and incompetents must be so designated)	Relationship
Barbara Thurston	Campbell's Rest Home, 29 Ingersoll Grove, Springfield, MA	Wife
Peggy Thurston,	(Apt. 17 Randolph Circle	Minor Daughter
Patty Thurston	(Randolph Vermont 05060	Minor Daughter
Christopher Thurston	Protective Service Springfield, MA	Minor Son

Petitioner prays that she be appointed administratrix of said estate with surety on bond and certifies under the penalties of perjury that the foregoing statements are true to the best of her knowledge and belief.
Dated 10-8/81 Signature(s) /s/ Lois J. Thurston Kibbe
The undersigned hereby assent to the foregoing petition.
/s/ Barbara Lee Thurston

DECREE

All persons interested having been notified in accordance with the law or having assented and no objections being made thereto, it is decreed that Lois J. Kibbe otherwise Lois J. Thurston Kibbe, of Springfield, in the County of Hampden, be appointed administratrix of said estate first giving bond with sureties for the due performance of said trust.

Date January 8, 1982

/s/ Frank Placzek
Judge of Probate Court
Frank Placzek.
Cit. Ret. Dec. 11, 1981

"EXHIBIT A"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

#82-0275-F

LOIS THURSTON KIBBE, Administratrix of the Estate of CLINTON H. THURSTON, Deceased, as Administratrix,
Plaintiff
vs. DEFENDANTS' ANSWER
CITY OF SPRINGFIELD and THEODORE PERRY, JOHN TROY, KENNETH SCHAUB, JOHN REIGNER, ERIC RISCH, GILES DAIGNEAU, FRANK DAIGNEAU, CHARLES KUPRAS, THOMAS RONDEAU, FRANCIS LUSSIER, and OTHER UNKNOWN SPRINGFIELD POLICE OFFICERS, Individually and in their official capacities
Defendants

Now come the defendants in the above-captioned action, and for answer to each and every allegation contained in the plaintiff's complaint state as follows:

FIRST DEFENSE
ANSWER TO JURISDICTION

1. Admitted.
2. Admitted.
3. Admitted.

ANSWER TO PARTIES

4. Admitted.
5. Admitted.
6. Admitted.

31. Denied
32. Denied.
33. Admitted.
34. Admitted.
35. Denied.
36. Denied.
37. Admitted.
38. Denied.
39. Admitted.
40. Denied.
41. Denied.
42. Admitted.
43. Denied.
44. Denied.
45. Denied.
46. Denied.
47. Denied.
48. Denied.

ANSWER TO FIRST CAUSE OF ACTION

49. The defendants repeat and reaffirm each and every response given to the allegations alleged in paragraphs 1 through 48, and same are incorporated herein as if fully set forth.
50. Denied.
51. Denied.
52. Denied.
53. Denied.
54. Denied.

ANSWER TO SECOND CAUSE OF ACTION

55. The defendants repeat and reaffirm each and every response given to the allegations alleged in paragraphs 1 through 48 and 50 through 52, and same are incorporated herein as if fully set forth.

56. Denied.

ANSWER TO THIRD CAUSE OF ACTION
ANSWER TO COUNT I

57. The defendants repeat and reaffirm each and every response given to the allegations alleged in paragraphs 1 through 56, and same are incorporated herein as if fully set forth.

58. Denied.

59. Denied.

ANSWER TO COUNT II

60. Admitted.

61. The defendants repeat and reaffirm each and every response given to the allegations alleged in paragraphs 1 through 56, and same are incorporated herein as if fully set forth.

62. The defendants repeat and reaffirm each and every response given to the allegation alleged in paragraph 58, and same is incorporated herein as if fully set forth.

SECOND DEFENSE

At all times material, each of the above-named police officers was acting lawfully as a duly authorized police officer for the City of Springfield and as such each is entitled to all the immunities and protections of law so provided.

THIRD DEFENSE

At all times material, the plaintiff's intestate was engaged in the commission of a felony, and as a matter law, any affirmative recovery is barred.

FOURTH DEFENSE

At all times material, each of the above-named defendants was acting in accordance with the rules and regulations of the Springfield Police Department and the laws of this Commonwealth.

FIFTH DEFENSE

At all times material, the defendant, City of Springfield, was acting in accordance with the laws of this Commonwealth.

The defendants request a trial by jury.

THE DEFENDANTS

By: _____

EUGENE J. MULCAHY, THEIR ATTY.
ASSISTANT CITY SOLICITOR
City Hall — Law Department
36 Court Street
Springfield, MA 01103
(413) 787-6085

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

HAMPDEN, SS. CIVIL ACTION
NO. 82-1174

LOIS THURSTON KIBBE, ADMNTRX.,
Plaintiff
vs
CITY OF SPRINGFIELD,
Defendant

DEFENDANT CITY OF SPRINGFIELD'S
MOTION FOR A DIRECTED VERDICT

Now comes the defendant City of Springfield and moves this Honorable Court for a directed verdict in its favor.

As grounds therefore, your movant states that:

1. The plaintiff has failed to produce any evidence that the implementation of an unconstitutional policy or custom of the City of Springfield caused the deprivation of plaintiff's constitutional rights. *Monell v. New York City Department of Social Services,* 436 U.S. 658, 690 (1978).

2. The plaintiff has failed to produce any evidence that the defendant City of Springfield negligently trained or supervised any of the defendant City of Springfield Police Officers.

3. Under 42 U.S.C. § 1983, liability cannot be imposed on a city even for its grossly negligent failure to train single police officers or for isolated incident of police conduct. *Lanquirand v. Hayden,* 717 F2d 220 (1983); *Wellington v. Daniels,* 717 F2d 932 (1983). To recover a plaintiff must show either

pattern of similar incidents or the existence of wide spread incompetence or abuse throughout the police force. *Cf. Owens v. Hass,* 601 F2d 1242 (1979), *cert den* 44 US 980 (1979). The plaintiff has failed to produce any such evidence.

RESPECTFULLY SUBMITTED
THE DEFENDANT
CITY OF SPRINGFIELD

By _____
Edward M. Pikula
Assistant City Solicitor

Law Department
City of Springfield
36 Court Street
Springfield, MA 01103
(413) 787-6085

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LOIS THURSTON KIBBE, ADMITRX,
Plaintiff
vs

CIVIL ACTION
NO. 82-1174

CITY OF SPRINGFIELD, ET AL
Defendants

DEFENDANTS' REQUEST FOR JURY INSTRUCTIONS

DEFENDANT CITY OF SPRINGFIELD'S REQUEST FOR JURY INSTRUCTION

The City of Springfield cannot be found liable for negligently failing to train a single police officer. It is the plaintiff's burden to prove, not merely an isolated incident of negligent training, but must show either a pattern of similar incidents or the existence of widespread incompetence or abuse throughout the police force. *Lanquirand v. Hayden*, 717 F.2d 220 (1983); *Wellington v. Daniels*, 717 F2d 932 (1983).

It is not the City's burden of proving its training was adequate, but rather, it is the plaintiff's burden to prove the City's training was inadequate.

Further, the plaintiff has the burden of proving the City was not merely negligent in its training, but grossly negligent in failing to train its police officers. *Lanquirand v. Hayden*, 717 F.2d 220 (1983); *Wellington v. Daniels*, 717 F2d 932 (1983).

In order to find the City of Springfield liable for negligently training its police officers, you must also find that the negligent training was the proximate cause of plaintiff's injuries.

The City of Springfield may not be held liable for civil rights violation due to the mere fact that the City was supervising a person who caused the violation. *Rizzo v. Goode*, 423 U.S. 362 (1976).

For the purposes of your deliberation, it makes no difference, and you should not consider, that the City is a large governmental entity. The City is entitled to be judged fairly just like any individual. Under our system of justice a large governmental entity is as entitled to rely on its legal rights to the same extent as any individual person.

If you find one or more of the defendant police officers liable, that does not mean that you should find the City of Springfield liable. The circumstances under which the City can be held liable are much more limited than the circumstances under which you can find the defendant police officers liable. I will now explain the difference to you.

The City is not liable merely because it employs a police officer who violates a person's constitutional rights. Rather, the City of Springfield can only be liable if you find that the action of the police officer alleged to be unconstitutional implements or executes an unconstitutional policy officially adopted and promulgated by the City's policy making officers. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 (1978).

The City of Springfield may also be liable if you find that the plaintiff's constitutional rights were deprived pursuant to an unconstitutional government custom even though such a custom has not received formal approval through the body's official decision-making channels. *Id.* at 691.

Accordingly, the City of Springfield can only be held liable if you find three elements present in this case. The first element is the implementation or execution of an unconstitutional municipal policy or custom by the defendant police officers. The second element is that the implementation or execution of that policy or custom caused a deprivation of the plaintiff's constitutional rights. The operative word here is *caused*. The

third element is a deprivation of the plaintiff's constitutional rights. *Id., Landrigan v. City of Warwick,* 628 F.2d 736, 746 (1st Cir. 1980). Now let me define for you what is meant by the terms policy and custom.

A policy is a settled or definite course, plan or method to be followed. *Rinchof v. Freedman,* 10 Arz. 220, 457 p.2d 760, 762 (1969), *Williamson v. City of High Point,* 213 N.C. 86, 195 S.E. 90, 97 (1938). An example of a policy would be the police department forbidding its officers to wear beards.

For the City of Springfield to be liable, however, the mere existence of a policy is not enough. The only type of policy that is sufficient to hold the City liable is one which is unconstitutional and has been promulgated by its lawmakers (the Mayor or City Council) or by those city officials whose edicts or acts may fairly be said to represent the official policy of the City. *Monell v. New York City Department of Social Services, supra* at 694, *Turpin v. Mailet,* 619 F.2d 196, *fn* 1 (2d Cir. 1980); *Smith v. Ambrogio,* 456 F.Supp. 1130, 1139 (D.Conn. 1978); *Polk County v. Dodson,* 102 S. Ct. 445 (1981).

A custom, in contrast to a policy, is not something which is usually written down or articulated. A custom which would give rise to liability is made up of persistent and widespread unconstitutional practices not authorized by written law. *Monell, supra* at 691 citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 167-168 (1970); *Polk County v. Dodson, supra.*

If you find no evidence of an unconstitutional City of Springfield policy or custom, then you must find the City of Springfield not liable.

Up to this point, I have been explaining the very limited circumstances under which the City of Springfield may be found liable. At this juncture, I want to emphasize that the City is not liable merely because one or more of the defendant police officers may be liable. The mere fact that the City employed

the defendant police officers is not sufficient to hold the City liable. *Monel, supra* at 691. Therefore, if you find that one or more of the defendant police officers injured the plaintiff, the City is not liable just because it employed the police officers.

The only circumstances under which you may find the City liable is when you believe the evidence supports a finding that when the defendant police officers violated the plaintiff's constitutional rights they were acting pursuant to a City of Springfield policy or custom.

Accordingly, I instruct you to find the City of Springfield not liable if you believe what happened to the plaintiff was an isolated incident, or an accident because an isolated incident or accident does not occur pursuant to a policy or custom. *Landrigan v. City of Warwick, supra* at 747 (1st Cir. 1980); *Turpin v. Mailet,* 619 F.2d 196, 202 (2d Cir. 1980); *Magaynes v. City of Chicago,* 496 F.Supp. 816 (N.D. Ill. 1980); *Dominguez v. Beame, supra.*

Furthermore, I instruct you to find the City of Springfield not liable if you believe that the police officers were acting on their own and not at the direction of any city official whose acts or edicts may fairly be said to represent the official policy or custom of the City. *Monell, supra* at 694. By acting on their own, I mean that the police officers exercised their own discretion to arrest the plaintiff believing her to be the prostitute, and were not instructed by any policy maker of the City of Springfield.

You may not award any punitive damages against the City of Springfield. *Facts Concerts, Inc. v. City of Newport,* 101 S. Ct. 2948 (1981).

DEFENDANT THEODORE PERRY'S REQUEST FOR JURY INSTRUCTIONS

On the plaintiff's claims for deprivation of Clinton Thurston's constitutional rights, the plaintiff has the burden of proving by a preponderance of the evidence that the defendants have violated Clinton Thurston's constitutional rights. In other words, the plaintiff has to convince you by a preponderance of the evidence that Clinton Thurston's death was so outrageous that it shocks the conscience and amounts to more than an ordinary death in the course of the arrest of a fleeing felon. *Wright v. El Paso County Jail,* 642 F.2d 134-136 (5th Cir. 1981); *Johnson v. Glick, supra*; *Baker v. McCollan, supra*.

In determining whether the constitutional line has been crossed, you must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injuries inflicted, and whether the force was applied by the defendant in a good faith effort to discharge his lawful duties or whether it was applied maliciously and sadistically for the purpose of causing harm. Johnson v. Glick, 481 F.2d 80 (1st Cir. 1979).

Thus, if you are not convinced by a preponderance of the evidence that the death of Clinton Thurston was so outrageous as to shock the conscience, you must return a verdict in favor of the defendants.

If you find that the defendants' conduct did not violate clearly established statutory or constitutional rights of which a reasonable person under similar circumstances would have known, then you must find for the defendants under the good faith immunity to which the Defendant police officers are entitled. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

The plaintiff, in order to overcome the police officers' immunity from liability, also must prove by a preponderance of the evidence that the police officers acted in bad faith or with

a malicious intent. *Barker v. Norman, supra* at 1121-1122; *Whitely v. Seibel,* 613 F.2d 682, 685 (7th Cir. 1980).

Therefore, if you are not convinced by a preponderance of the evidence that the police officers acted in bad faith or with a malicious intent you must return a verdict in favor of the defendants.

A police officer acting in the performance of his duty has the right to use the force which is reasonably necessary to overcome resistance by a person sought to be arrested.

A police officer, acting in the performance of his duty while making an arrest, is justified in using reasonable force, and if the circumstances made it reasonably necessary, he could even use such force as might result in the killing of the person to be arrested. Commonwealth v. Young, 326 Mass. 597, 602 (1950).

An officer, when attempting to make a lawful arrest is entitled to defend himself against attack, and is not required to nicely measure or narrowly gauge the force to the amount required from its retrospective view. If you find that the police officers acted in self defense during an attempt to make a lawful arrest, you must find for the defendants. Conklin v. Barfield, 334 S. Supp. 475 (D.C. Mo. 1971).

A police officer in the lawful performance of his duties may use such force as an ordinary prudent man would employ under similar circumstances to protect himself from attack and such use of force will not constitute a violation of the attacker's civil rights. If you find that the officers used only such force, then you must find for the defendants. *Monroe v. Pape,* 365 U.S. 167.

The plaintiff must prove by a preponderance of the evidence that the officer used excessive force in defending himself against attack and if the plaintiff fails to sustain this burden, you must find for the defendants. Ware v. Garvey, 139 F. Supp. 71 (D.C. Mass).

A person arrested and taken into custody has a duty to go with a police officer who arrests him. If the person so arrested resists arrest, the police officer has the right to use reasonable force to overcome the resistance, but not the right to use unreasonable or unnecessary force, or to wantonly or maliciously injury the person in custody. *Powers v. Sturtevant,* 199 Mass. 256, 266 (1908).

If the police officer was an honest man and was performing his duty and engaged in administering the law he would perhaps under ordinary conditions be in a position to judge better than the judge or jury, as to the force required and should be allowed considerable discretion and that should go for something if he acted fairly and honestly without malice, or intention to injure or hurt the person arrested. *Powers v. Sturtevant, supra.*

The question is not whether the police officer acted without malice and in the honest belief that the force which he used was necessary, but whether under the circumstances the force used was in fact unreasonable and excessive. *Powers v. Sturtevant, supra.*

If you find the defendants not liable on the constitutional claims, then you may not assess any damages.

You are only permitted to award punitive damages against the police officers if you believe that there are aggravating circumstances in this case. To find aggravating circumstances you must be convinced by a preponderance of the evidence that the police officers acted with malice. *Rosado v. Santiago,* 562 F.2d 114, 121 (1st Cir. 1977).

Punitive damages should not be awarded unless you find that the defendants acted in a wanton and malicious manner towards Clinton Thurston and that there was no provocation on the part of Clinton Thurston. *Denver & R.G.R.C. v. Harris,* 122 U.S. 197 ( ).

Furthermore, punitive damages may not be awarded against the police officers where actual damages suffice to deter a defendant's wrongdoing. *Id.*

Punitive damages for an injury should not be awarded if you find the party seeking such damages by his own aggressive or provocative behavior incited the action leading to said injury. *Hopper v. Voss,* 123 F.Supp. 371 (D.C. La. 1954).

The Commonwealth of Massachusetts has a statute known as the comparative negligence statute. Under that law, if the plaintiff's own negligence contributed to his death, and the plaintiff's negligence was more than the defendant. On a percentage basis, to describe it a different way, if the Clinton Thurston was more than 50% negligent, the plaintiff cannot recover. If Clinton was exactly 50% negligent, or he was negligent but less than 50% negligent, any damages which he would recover must be diminished in proportion to the amount of negligence which is attributable to Clinton Thurston. And the combined total of the plaintiff's negligence, taken together with the negligence of the defendant, must equal 100%.

So in this case it is up to you, the members of the jury, to determine whether Officer Perry was negligent. And it is also up to you to determine whether Clinton Thurston was negligent. And it is also up to you to determine whether Clinton Thurston was negligent. If you find that Officer Perry was not negligent, or that the actions of Officer Perry were not the proximate cause of the death of Clinton Thurston, then you would not need to consider any negligence of Clinton Thurston because you would have to find for the Defendant Officer Perry. But if you found that Officer Perry was negligent, then you must consider whether Clinton Thurston was also negligent — whether what he did or failed to do contributed to his own death. And if you do determine that Clinton Thurston was negligent, they you must determine to what extent he was negligent, and you would express that in a percentage. If his negligence is more than 50%, then you must find for the Defendant Officer Perry, because the plaintiff's action would be barred. G. L. c. 231, § 85.

Wrongful Death

In Massachusetts, a person who negligently causes the death of a person or by willful, wanton or reckless act causes the death of a person, damages may be assessed in the amount of:

1. The fair monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to, compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered; and,
2. The reasonable funeral and burial expenses of the decedent.

In this case you should find the decedent's death was caused by malicious, willful, wanton or reckless conduct or gross negligence of the decedent. Therefore, punitive damages in an amount no less than $5,000.

Inquest

In this case, there has been evidence regarding an inquest. In the Commonwealth of Massachusetts, "the inquest serves as an aid in the achievement of justice by obtaining information as to whether a crime has been committed. . . ."There is no inherent right of any witness at an inquest to cross-examine other witnesses or to present evidence of his aim. However, the magistrate holding the inquest has wide discretion on its conduct and may permit cross-examination on the presentation of evidence by possibly interested persons when it may be helpful to the magistrate." *Lemedy v. Justice of District Court of Dukes County*, 356 Mass. 367 (1969).

Deadly Force

This case involves the use of deadly force. Deadly force is defined as "force intended or likely to cause death or great bodily harm." Firing shots from a handgun is deadly force, however, a dangerous weapon is not restricted to guns and knives, but may be almost any object capable of inflicting harm, including an automobile.

A police officer is justified in using deadly force to prevent the escape of or fleeing felon when:

a. the arrest is for a felony;
b. the officer reasonably believes the force employed creates no substantial risk of injury to innocent persons; and
c. the officer believes that:

1. the crime for which the arrest is made, involved conduct including the use or threatened use of deadly force; or
2. there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Commonwealth v. *Kliens*, 372 Mass. 823 (1977), § 3.07 of the Model Penal Code.

Felony

In Massachusetts, the crimes of assault with a dangerous weapon, breaking and entering, assault in a dwelling, kidnapping, and attempt to murder. G.L. c. 265, § 16B, G.L. c. 265, § 18A, G.L. c. 265, § 2 6, G.L. c. 265 § 16.

Refusing to Stop for a Police Officer

It is a criminal offense for a person to refuse to stop or give his name, address and the address of the owner of the motor vehicle or to give name and address when requested by a police officer who is in uniform and who displays his badge conspicuously in the outside of his garment. G.L. c. 90, § 25.

THE DEFENDANTS

_____

Edward M. Pikula
Assistant City Solicitor

_____

Eugene Mulcahy

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT MASSACHUSETTS
CASE TITLE LOIS THURSTON KIBBE, ADMINISTRATRIX OF THE ESTATE OF CLINTON THURSTON V. CITY OF SPRINGFIELD, ET AL	DOCKET NUMBER CA 82-0275-F NAME OF JUDGE OR MAGISTRATE Frank H. Freedman

☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment for the plaintiff against the defendant Theodore Perry on violations of the Civil Rights statute with compensatory damages awarded in the amount of $1.00 and punitive damage in the amount of $500.00.
Judgment for the defendant, Theodore Perry on violations of the wrongful death statute.

Judgment for the plaintiff against the defendant, city of Springfield, on violations of the Civil Rights statute with compensatory damages awarded in the amount of $50,000.00.

Judgment for the defendants Eric Risch, John Troy and Kenneth Schaub on violations of the Civil Rights statute.

Judgment for the defendants, Eric Risch, John Troy, Kenneth Schaub and the city of Springfield on the plaintiff's claims of conscious suffering, the court having directed verdict on that claim.

Judgment for the defendants Eric Risch, Kenneth Schaub, John Troy and the city of Springfield on the plaintiff's wrongful death claims, the court having directed verdicts on those claims.

Received Nov. 26, 1984
City of Springfield
Law Department

CLERK
George F. McGrath

DATE
11/23/84

(BY) DEPUTY CLERK
/s/ John C. Stuckerbuck

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

HAMPDEN, ss

CIVIL ACTION
No. 82-1174

LOIS THURSTON KIBBE, ADMNTRX.,
Plaintiff
vs
CITY OF SPRINGFIELD,
Defendant

DEFENDANT CITY OF SPRINGFIELD'S
MOTION FOR JUDGMENT NOTWITHSTANDING
THE VERDICT

Now comes the Defendant, City of Springfield, and moves this Honorable Court pursuant to Federal Rules of Civ. P. Rule 50b to set aside the verdict returned on November 23, 1984, and enter a judgment in favor of the defendant notwithstanding the verdict.

As grounds therefore, your movant states that:

1. The plaintiff has failed to produce any evidence that the implementation of an unconstitutional policy or custom of the City of Springfield caused the deprivation of plaintiff's constitutional rights. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 (1978).

2. The plaintiff has failed to produce any evidence that the defendant, City of Springfield, negligently trained or supervised any of the defendant City of Springfield Police Officers.

3. Under 42 U.S.C. § 1983, liability cannot be imposed on a city even for its grossly negligent failure to train single police officers or for isolated incident of police conduct. *Lan-*

quirand v. Hayden, 717 F2d 220 *cert den* 104 S.C. 2656 (1983): *Wellington v. Daniels*, 717 F2d 932 (1983). To recover, a plaintiff must show either pattern of similar incidents or the existence of wide spread incompetence or abuse throughout the police force. *Cf. Owens v. Hass.*, 601 F2d 1242 (1979), *cert den* 44 U.S. 980 (1979). The plaintiff has failed to produce any such evidence.

RESPECTFULLY SUBMITTED,
THE DEFENDANT
CITY OF SPRINGFIELD

/s/ Edward M. Pikula
Edward M. Pikula
Assistant City Solicitor

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LOIS THURSTON KIBBE,
Plaintiff
v. CIVIL ACTION NO. 82-0275-F
CITY OF SPRINGFIELD and
THEODORE PERRY,
Defendants

MEMORANDUM AND ORDER

December 21, 1984

FREEDMAN, D.J.

Defendants in the above-captioned case have moved for a judgment notwithstanding the verdict after a jury found against them and for the plaintiff on plaintiff's civil rights claim.[1] Having heard the parties' arguments, and having reviewed the evidence in the case, the Court has concluded it must deny both defendants' motions and grant a new trial because of inconsistencies in the jury verdicts.

Plaintiff is the administratrix of the estate of Clinton Thurston, who was shot and killed by defendant Officer Perry in a car and motorcycle chase on September 28, 1981. Perry, who was on the motorcycle, was chasing Thurston, who was driving a car. Thurston was swerving his car back and forth. Perry could have dropped back to prevent himself from being struck; instead he shot Thurston in the head. There was evidence both that Perry shot Thurston in self defense after Thurs-

[1] The three other defendants, Eric Risch, John Troy and Kenneth Schaub, are now out of the case, since the jury found in their favor and plaintiff has not objected.

ton three times tried to veer his car into Perry and also that Perry shot Thurston because Perry thought Thurston tried to run down other officers involved in the chase. Thurston had an abducted passenger with him, but Perry was unaware of this. In any case, a subsequent internal investigation cleared Perry on the grounds that he had followed his department's rules and regulations.

The case went to the jury on civil rights and wrongful death theories. The civil rights claim ran against both Perry and the City. The jury was instructed that in order to find Perry liable, it must conclude that Perry unreasonably used deadly force in apprehending Thurston. The Court instructed the jury that in Massachusetts a police officer constitutionally may use deadly force in effecting an arrest if 1) the arrest is for a felony; 2) the officer reasonably believes the force employed creates no substantial risk of injury to innocent persons; and 3) the officer reasonably believes that (a) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (b) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed. *Commonwealth v. Klein*, 363 N.E.2d 1313, 1318-19 (1977).

As for the City's civil rights liability, the Court instructed the jury that the City could be found liable only if Perry's actions were in accordance with a custom or policy of the City and those actions caused the deprivation of Thurston's rights. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 (1978).

The Court instructed the jury that, if it found the plaintiff entitled to compensatory damages, it could consider whether an assessment of punitive damages against the individual officer, but not the City, was in order. The jury was told it could award punitive damages only if it found Perry acted wilfully, maliciously, or with reckless disregard of Thurston's constitutional rights.

The wrongful death claim ran against only defendant Perry. Following the Massachusetts wrongful death statute, Mass. Gen. Laws ch. 229, § 2, the Court instructed the jury that it could assess damages in the amount of the value of the decedent to various living persons if it found Perry's conduct to be either negligent or wilful, wanton or reckless. *Id.*

The jury returned inconsistent verdicts. On special verdict forms, the jury found defendant Perry liable on the civil rights theory and awarded actual damages of $1 and punitive damages of $500. The jury also found the City liable for a deprivation of Thurston's civil rights and awarded actual damages of $50,000. The jury found for Perry on plaintiff's wrongful death claim.

The verdicts are inconsistent in two respects, and a new trial must be had as to both defendants on both theories. First, the $1/$50,000 discrepancy is inconsistent, since the two sums are supposed to represent compensation for the same civil rights violation, namely, Thurston's death. There is no way to explain how a policy of using excessive force could cause more actual damage to a deceased individual than the use of the excessive force itself.

The second inconsistency is between the assessment of punitive damages against Perry and the finding of non-liability on the wrongful death theory. Both require wilful or reckless conduct. In fact, it appears that the "wilfulness" in the punitive standard might be even higher than that required in the wrongful death statute, so that a finding on the former would necessarily encompass, if not equal, a finding on the latter. It is possible that the jury found Perry *liable* for wrongful death, but was unable to assess his monetary worth to any of the statutorily eligible individuals. However, there was room on the special verdict slip for the jury to indicate it reached this result, and the Court is hesitant to infer that the jury just filled out the form incorrectly.

Both defendants have moved for judgment notwithstanding the verdict. Fed. R. Civ. P. 50(b). Defendant Perry argues for a j.n.o.v. solely on the grounds of the inconsistent verdicts; however, the remedy for this is a new trial, especially where there is ample evidence from which a jury could find that Perry violated Thurston's civil rights.

The City's arguments for a j.n.o.v. are somewhat more substantive. The City contends that under current standards, a municipality cannot be held liable for a negligent failure to train its officers absent a pattern of similar incidents or a history of widespread abuse. *Wellington v. Daniels,* 717 F.2d 932, 936 (4th Cir. 1983); *Languirand v. Hayden,* 717 F.2d 220, 227-28 (5th Cir. 1983), *cert. denied,* 104 S. Ct. 2656 (198). In short, the plaintiff must demonstrate that the City had a policy of being deficient in training its police officers.

The Court is of the opinion that there was evidence adduced at trial from which a jury could infer such a policy, and therefore the City's j.n.o.v. motion must be denied. Specifically, the Springfield Police Department cleared defendant Perry of any wrongdoing in this matter. In fact, it found he had acted in accordance with the Department's own policy. However, it is not clear from the evidence why Perry fired: did he shoot Thurston because he knew Thurston was a dangerous fleeing felon, *see Commonwealth v. Klein, supra* p. 2, or did he take unreasonably excessive action to protect himself from Thurston's swerving vehicle? If the latter is the case — and there was evidence from which a jury could conclude this — then Perry acted unconstitutionally pursuant to his department's own policies.

These competing conclusions that can be drawn from the evidence in the case preclude granting the City's j.n.o.v. motion. And, because of the inconsistencies in the special verdicts, there must be a new trial for both defendants.

The motions of defendants Perry and City of Springfield for judgment notwithstanding the verdict are DENIED. The new trial will be on January 14, 1985 at 11:30 a.m. before a fresh jury panel.

It is So Ordered.

/s/ Frank H. Freedman
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 82-0275-F

LOIS THURSTON KIBBE,
Administratrix of the Estate of
of CLINTON THURSTON,
vs NOTICE OF APPEAL OF DEFENDANT
CITY OF SPRINGFIELD
CITY OF SPRINGFIELD, et als
Defendants

Notice is hereby given that the City of Springfield, Defendant above named, hereby appeals to the United States Court of Appeals for the First Circuit from the Memorandum and Order dated December 21, 1984 denying its Motion for Judgment Notwithstanding the Verdict, as well as the denial of its Motion for Directed Verdict, Jury Verdict, and the Reinstatement of Judgment dated November 23, 1984, of the Federal District Court for the District of Massachusetts, holden at Springfield.

THE DEFENDANT,
CITY OF SPRINGFIELD

By /s/Edward M. Pikula
Edward M. Pikula
Assistant City Solicitor

Law Department
City of Springfield
36 Court Street
Springfield, MA 01103
(413) 787-6085

RULES AND REGULATIONS OF THE POLICE DEPARTMENT OF THE CITY OF SPRINGFIELD MASSACHUSETTS

ADOPTED 1981

INDEX

	PAGE	RULE NUMBER
Academy, Police	17	Rule 13
Administrator	38	Rule 18
Aerosol Irritant Devices	72-76	Rule 28B
Captains	4-5	Rule 5
Captain, Senior	3	Rule 4
Charges & Hearings	104-110	Rule 32
Chief of Police	1	Rule 2
Chiefs of Police, Deputy	2	Rule 3
Clubs	71	Rule 28A
Commanding Officers, Superior Officers, Officers of Rank & Precedence of Rank	6	Rule 6
Commissioners, Duties of	1	Rule 1
Conduct of Members	77-93	Rule 29
Crime Prevention Bureau	10-11	Rule 9
Detective Bureau	9	Rule 8
Firearms	67-70	Rule 28
Garage, Police	40-41	Rule 20
Insignia, Official for Police Commission	113	Rule 34
Internal Investigating Unit	114	Rule 35
K-9 Unit	121-126	Rule 39

INDEX

	PAGE	RULE NUMBER
Leave of Absence - With/ Without Pay	116-118	Rule 37
Lieutenants	7-8	Rule 7
Matrons	35	Rule 16
Medals of Honor, Departmental & Departmental Recognition	111-112	Rule 33
Motor Vehicles, Radio Cars & Walkie-Talkie Radios	45-48	Rule 22
Mounted Patrol, Officers	127-128	Rule 40
Oath of Office	115	Rule 36
Pay	96-103	Rule 31
Police Officer	21-34	Rule 15
Prisoners	60-64	Rule 26
Property, Departmental Property, Division	65 66-66A&B	Rule 27
Pursuit, High Speed	49-51	Rule 23
Radio Engineer	42-44	Rule 21
Records, Police System	36-37	Rule 17
Rules, General of the Detective, Crime Prevention Youth Aid & Traffic Bureaus	15-16	Rule 12
Sergeants	19-20	Rule 14
Signal System, Superintendent of Police	39	Rule 19
Special Police & Auxiliary Police	52-54	Rule 24
Station Houses	55-59	Rule 25
Traffic Bureau	13-14	Rule 11
Underwater Search & Rescue	117-120	Rule 38
Uniforms	94-95	Rule 30
Youth Aid Bureau	12	Rule 10

ORGANIZATION

A. Statement of Purpose
B. Chart of Organization (dated)
C. Identifiable Bureaus and Units within the Department, their purpose and composition.

1. Traffic Bureau	Pgs. 13-14,	Rule 11
2. Detective Bureau	Pg. 9	Rule 8
3. Crime Prevention Bureau	Pgs. 10-11,	Rule 9
4. Youth Aid Bureau	Pg. 12	Rule 10
5. Internal Investigating Unit	Pg. 114,	Rule 35
6. K-9 Units	Pgs. 122-126	Rule 39
7. Garage	Pg. 40	Rule 20
8. Property	Pg. 27	Rule 15
9. Records	Pg. 36	Rule 17
10. Academy	Pg. 17	Rule 13
11. Underwater Search	Pg. 117-120	Rule 38
12. Matrons	Pg. 35	Rule 16
13. Mounted Patrol	Pgs. 127-128	Rule 40

II. PERSONNEL

A. Oath of Office	Pg 115	Rule 26
B. Ranks - their duties, responsibilities, authorized insignias & uniforms.		
1. Police Commissioners	Pg. 1	Rule 1
	Pg. 113	Rule 34
2. Chief of Police	Pg. 1	Rule 2
3. Deputy Chief	Pg. 2	Rule 3
3A Senior Captain	Pg. 3	Rule 4
4. Captains	Pg. 4-5	Rule 5

II. PERSONNEL, cont.

4A Commanding Officers, Superior Officers, Officers of Rank and Precedence of Rank	Pg. 6	Rule 6
5. Lieutenants	Pgs. 7-8	Rule 7
6. Sergeants	Pgs. 19-20	Rule 14
7. Police Officers	Pgs. 21-34	Rule 15
8. Special Police, Auxiliary Police	Pgs. 52-54	Rule 24
9. Administrator	Pg. 38	Rule 18
10. Superintendent of Police Signal System	Pg. 39	Rule 19
11. Radio Engineer	Pg. 42	Rule 21
C. Code of Conduct	Pg. 77-95	
1. Dress Code	Pgs. 94-95	Rule 30
2. Grooming	Pg. 87	Rule 29
3. Saluting	Pg. 85	
D. Pay (define duties which are to be compensated by Department)	Pgs. 96-99	Rule 31
1. Physician forms, definition & when requested	Pgs. 99-102 "L", "M"	Rule 30
2. Injured on Duty - definition & determination (Indemnification Board)		
3. Sick - definition, determination and remuneration	Pgs. 96-103	Rule 31
4. Court Time	Pg. 89 Sec. 28	Rule 29
5. Bereavement Leave	Pg. 103	Rule 31

PERSONNEL, cont.

E. Leaves of Absence (Allowable types and conditions for granting)	Sec. 3 Pg. 86 Sec. 15	Rule 29 Rule 37
F. Extra-Duty Jobs (through the Department), Off-Duty Jobs	Pg. 81 Sec. 4	Rule 29
1. Private Detective Work	Pg. 81 Sec. 4	Rule 29
G. Personal Recognition		
1. Medals, plaques, commendations, awards	Pgs. 111-112	Rule 33
2. Gifts and gratuities	Pgs. 81-82 Sec. 4 Sec. 5 Pg. 103	Rule 29 Rule 31
H. Departmental solicitations & political affiliations		
I. Disciplinary charges, proceedings and trials		

III. DEPARTMENTAL EQUIPMENT AND WEAPONS

1. Station house and sub-stations	Pgs. 55-59	Rule 25
A. Motor Vehicles	Pgs. 46-49	Rule 22
1. Use of private car	Pg. 87 Sec. 19	Rule 29
B. Motorcycles	Pg. 14 Sec. 5 Pg. 45-49 Rule 22	Rule 11
C. Radio and Walkie-Talkie	Pg. 45-49	Rule 22
D. Firearms	Pgs. 67-70	Rule 28
E. Aerosol Irritant Devices	Pgs. 72-76	Rule 281

F. Clubs	Pg. 71	Rule 281
G. Garage	Pg. 40	Rule 20

IV. COMMUNITY RELATIONS

A. Treatment of Prisoners	Pgs. 60-64	Rule 26
B. Prisoner Publicity	Pg. 89	Rule 29
C. Citizen's Complaints	Pgs. 104-110	Rule 32
D. Public Speaking Engagements	Pg. 89 Sec. 26	Rule 29
E. Press Relations	Pg. 90	Rule 29
F. Safety Officer	Pg. 14 Sec. 6	Rule 11

The Board of Police Commissioners, for the City of Springfield, has established the following rules and regulations for the government, discipline, and supervision of the Police Department and of other persons, not members of the Police Department, insofar as the affairs of such persons are subject to their lawful authority. They may later amend, revoke, or add to these rules and regulations. In their application to the Police Department, it is to be understood that these rules do not cover every case which may arise, and that when found to be incomplete or apparently not adapted to a particular emergency or situation, members of the Department will be expected to use good judgment and act with intelligence and discretion.

The establishment of these rules and regulations shall not affect any punishment or penalty incurred under any previously existing rule, regulation, or order, and the provisions of these rules, so far as they are the same as those of existing rules or orders, shall be construed as a continuation thereof and not as new rules.

Police Officers shall be responsible to see that this Rule Book is kept up-to-date.

RULE 1.

SECTION 1. The Board of Police Commissioners, subject to the revised ordinances of the City, have the appointment, management and control of the members and employees of the Police Department.

The Board of Police Commissioners shall make such lawful rules for the maintenance of the Police Department, including the regulations, government and discipline of such members and employees.

The Rules and Regulations of the Police Department as adopted and promulgated by the Board of Police Commissioners

with all amendments, shall be the lawful rules for the maintenance of the Police Department, and for the regulation, government and discipline of all members and employees thereof.

RULE 2. CHIEF OF POLICE

SECTION 1. The Chief shall have authority and precedence over all members and employees of the Department below the grade of Chief and the said members shall, be subject to his command and control. He shall, subject to the Orders, Rules and Regulations of the Board of Police Commissioners, from time to time, issue orders consistent with the laws of the Commonwealth and the Ordinances of the City as may be necessary for the maintenance of proper discipline in the Department, for the detail and duties of its members and employees and for the use and disposition of its equipment.

SECTION 2. All orders to the Chief shall emanate from and be issued to him in writing by the Board of Police Commissioners through its Chairman, by vote of the Board. All orders to members of the Department shall emanate from the Chief.

SECTION 3. Orders issued by the Chief affecting any considerable proportion of the members of the Department shall be in writing and delivered to a Deputy Chief or other superior officer and copies of such orders shall be kept on file in the Office of the Administrative Assistant. Copies of each of such orders shall be presented by the Chief to the Commission at their next meeting following issuance of such order.

RULE 3. DEPUTY CHIEFS OF POLICE

SECTION 1. The Deputy Chiefs of Police shall, be under the direction of the Chief of Police and shall aid in the performance of any and all of the duties of the Chief.

SECTION 2. In the absence of the Chief, the senior Deputy Chief (and in his absence, the junior Deputy Chief) shall have all the powers and perform all the duties of the Chief of Police.

SECTION 3. The "absence of the Chief of Police" referred to in this rule shall mean that the Chief is not present to give attention to matters requiring his attention, whether he be in or absent from the City.

SECTION 4. Each Deputy Chief shall report personally to the Chief all matters of importance concerning police matters which come to his attention. Such reports shall be in writing and submitted to the Office of the Chief prior to the completion of the tour of duty of the Deputy Chief during which he learned of such matter or as soon thereafter as said office is open.

RULE 4. SENIOR CAPTAIN TO ASSUME CERTAIN DUTIES

SECTION 1. During the absence of the Chief of Police and of all Deputy Chiefs of Police, the senior Captain in the Department on duty, shall be authorized to act as Chief of Police and he shall assume all responsibilities of such office. He shall report in writing to the Chief or to the Deputy Chief who next returns any matters of importance occurring while the senior Captain assumed the responsibilities of such office.

RULE 5. CAPTAINS ASSIGNED TO UNIFORM DUTY

SECTION 1. The Captain on duty shall have, under the direction of his Deputy Chief, supervision of the uniformed members of the Department in his squad under the grade of Captain and he shall see that each such member is physically fit, properly equipped, and has a copy of the Department Rules and Regulations. He shall instruct the members of his squad as to the proper discharge of their duties and shall see that all orders, notices, and instructions are made known to them in a clear and concise manner.

SECTION 2. He shall report in writing to his Deputy Chief every case that is brought to his attention of sickness, misconduct, insubordination, absence without leave or from roll call, and every case of neglect or unfitness for duty on the part of any member of his squad.

SECTION 3. Prior to the completion of his tour of duty, each Captain shall transmit to his Deputy Chief a written report of all matters of importance occurring during his tour of duty.

SECTION 4. Each Captain shall be accountable for the maintenance and operation of the headquarters or station house and for the records which he is required to keep. He shall inspect or designate an officer to inspect the police building at the commencement of his tour of duty, paying particular attention to the condition of cells, first aid room, unnecessary lights, open windows in cold weather, etc. He shall see to it that neither police nor others loiter around the booking desk, information desk or other areas of the building subject to his supervision and he shall restrict the use of telephones to business required of the police.

SECTION 5. Except as permitted by Section 33 of Rule 29, "No Captain shall divulge nor permit any subordinate to divulge any information relative to accidents, investigations or other police matters to any person outside the Department without permission of the Chief of Police."

SECTION 6. Each Captain shall cause to be notified, the proper Bureau, squad or unit of cases which require their attention and shall give members of such Bureaus all available information which will assist them in their work.

SECTION 7. Each Captain shall be responsible for the proper appearance and condition of all of the members of his squad.

SECTION 8. Each Captain shall be responsible for carrying out the written and oral orders of the Chief of Police.

SECTION 9. It shall be the responsibility of all commanding officers to make certain that each member of their command

who operates a Department motor vehicle is properly licensed by the Registrar of this Commonwealth and that such license is in full force and effect. In this regard, all commanding officers shall keep a current record of such license data.

RULE 6. COMMANDING OFFICERS, SUPERIOR OFFICERS, OFFICERS OF RANK & PRECEDENCE OF RANK

SECTION 1. In these rules, the term "Commanding Officer" shall mean the Captain, superior officer or officer of rank in charge of a squad or of any of the various bureaus or divisions.

SECTION 2. Superior Officers or officers of rank designated as commanding officers by the Chief of Police, while acting as such, shall be responsible for carrying out the provisions of Rule 4 of this book of Rules and Regulations.

SECTION 3. The term "officer of rank" when used in this book of Rules and Regulations, shall mean an officer above the grade of Police Officer and when the term "superior officer" is used, it shall mean an officer above the grade of Sergeant. Thus, a Sergeant is an officer of rank but not a superior officer, a Lieutenant is an officer of rank and a superior officer.

SECTION 4. Superior Officers and officers of rank of the same grade shall rank according to date of appointment to that grade. When two or more officers are appointed to the same grade, on the same day, they shall rank relatively as named in the order of appointment.

SECTION 5. It will be the responsibility of the Commanding Officers to maintain the records of each employee's attendance, overtime, days off, vacation days, swap of days off and vacations. They shall forward to the Chief a report of any action or changes of the aforementioned. The Commanding Officers will base their decision with public safety in mind and the efficient operation of their command.

RULE 7. LIEUTENANTS

SECTION 1. Lieutenants, while on duty and in the absence of their Captain, shall have all the authority and perform all the duties of the Captain. They shall assist him in the discharge of his duties and render such other service as may be required by the Chief of Police. They must be familiar with the obligations and responsibilities of superior ranks. They shall give assistance to all subordinates in instructing or advising them in matters of police work.

SECTION 2. Lieutenants assigned to street patrol duty shall have charge of all Sergeants and Police Officers assigned to them. During their tours of duty, they will see that all the orders and instructions to the Sergeants and Police Officers in their squads are obeyed; give such necessary instructions as may be required to that end, and will be held responsible for the appearance and discipline of the Sergeants and Police Officers under them while on duty. Unless otherwise ordered, Lieutenants assigned to street patrol duty shall constantly patrol their assigned area unaccompanied by any other person. Before commencing a tour of duty, Lieutenants shall familiarize themselves with all important pending matters.

SECTION 3. A Lieutenant assigned to street patrol duty, shall immediately go to the scene of any homicide, serious crime or fire which occurs in his area. He shall keep his commanding officer informed of developments. Pending arrival of superior or investigating officers, he shall take charge at the scene and shall do all in his power to see that all precautions are taken to obtain and preserve evidence, to secure witnesses, and to effect the arrest of perpetrators wherever crime has been committed.

RULE 8 DETECTIVE BUREAU

SECTION 1. The Captain in charge of the Detective Bureau shall have, under the direction of his Deputy Chief, general supervision of the members of the Department assigned to the Detective Bureau.

SECTION 2. The Detective Bureau has the ultimate responsibility for the investigation and clearance by arrest of the perpetrator, when possible, for the following crimes and offenses: homicides, including criminal abortion where death results, robberies, assaults, arson, bomb investigations, larcenies of any type, embezzlements and larcenies by check, all burglaries and crimes of breaking and entering including those involving safes, counterfeiting, forgeries, kidnappings, and all auto thefts.

The Detective Bureau also has the responsibility for the proper supervision of pawnshops and second-hand stores, and the investigation of applicants for certain type licenses, i.e. used car dealers, junk collectors, etc. The Detective Bureau shall also investigate any other cases and perform any other duties assigned thereto by the Chief of Police or a Deputy Chief of Police.

SECTION 3. The Captain in charge of the Detective Bureau shall have, under the direction of his Deputy Chief, complete control and supervision of the fingerprinting and photography activities of the Department. Any other squad, bureau, or agency desiring the services and facilities of the above shall request the same from the Captain in charge of the Detective Bureau, or in his absence, from the official in charge of the Detective Bureau, at the time the services and facilities are desired.

SECTION 4. The Captain in charge of the Detective Bureau shall be responsible for the proper keeping and disposition of all Detective Bureau evidence.

RULE 9 CRIME PREVENTION BUREAU

SECTION 1. The Captain in charge of the Crime Prevention Bureau shall have, under the direction of the Chief of Police, general supervision of the members of the Department assigned to the Crime Prevention Bureau while they are on duty.

SECTION 2. The Crime Prevention Bureau shall be responsible for the prevention, suppression, investigations, and arrests in connection with all forms of commercialized vice and racketeering, including all illegal gaming and gambling establishments, all lotteries, all violation of liquor and narcotic laws, prostitution, sex deviations, pornographic materials, and all violations of Chapter 136 of the General Laws of Massachusetts, except where death occurs, under which circumstances the Detective Bureau shall investigate. The Crime Prevention Bureau shall be charged with the responsibility of checking public events for the above described purposes. The Crime Prevention Bureau shall also be responsible for the investigation of missing person complaints and the keeping of records in connection therewith. This Bureau shall closely cooperate with Federal and State agencies charged with the prevention and suppression of the illegal sale, use, possession or distribution of narcotic drugs and extend every effort to remove all traces of illegal drug traffic from this City.

SECTION 3. The Crime Prevention Bureau shall be responsible for the investigation of applicants for certain type of licenses, i.e. bowling alleys, pool rooms, etc. The Crime Prevention Bureau shall also investigate any other cases and perform any other duties assigned thereto by the Chief of Police or a Deputy Chief of Police.

SECTION 4. The Captain in charge of the Crime Prevention Bureau shall be responsible for the proper keeping and disposition of all Crime Prevention Bureau evidence.

RULE 10. YOUTH AID BUREAU

SECTON 1. An officer of rank or a superior officer shall be designated by the Chief of Police as Commanding Officer of the Youth Aid Bureau. The Commanding Officer of this Bureau shall, under the direction of his Deputy Chief, have general supervision of the members of this Bureau while they are on duty.

SECTION 2. The Youth Aid Bureau is charged with the responsibility of the prevention of delinquency among juveniles, all missing and runaway juveniles and with such other duties as the Chief of Police may assign thereto. The Youth Aid Bureau shall cooperate closely with the juvenile court authorities and the schools. The Youth Aid Bureau shall be responsible for the investigation and proper disposition of all cases assigned thereto, and shall cooperate closely with the Detective Bureau, the Crime Prevention Bureau, and the Traffic Bureau in cases involving juveniles. The Youth Aid Bureau is further charged with the responsibility of the recovery and restoration to the proper owner of stolen and lost bicycles and mopeds and the keeping of records in connection therewith.

SECTION 3. The Commanding Officer of the Youth Aid Bureau shall be responsible for the proper keeping and disposition of all Youth Aid Bureau evidence.

RULE 11. TRAFFIC BUREAU

SECTION 1. The Captain in charge of the Traffic Bureau shall, under the direction of his Deputy Chief, have general supervision of the members of the Department assigned to the Traffic Bureau while they are on duty.

SECTION 2. This Bureau shall be responsible for a thorough and complete investigation of traffic laws and parking violations.

SECTION 3. Members of the Department detailed to traffic and motorcycle duty must be courteous to the driving public and to pedestrians. They are assigned to the different posts for the purpose of preventing congestion, safeguarding pedestrians, preventing accidents, expediting vehicular traffic, and to prevent driving at excessive speed or in a manner that may endanger the lives or the safety of the public. Any person requesting information from them shall be given all necessary attention. They shall be courteous but brief, and any unnecessary conversation with the citizens is forbidden. They must not scold or berate any driver or pedestrian who violates any of the traffic rules.

SECTION 4. All members of the Department assigned to the Traffic Bureau shall strictly comply with the provision of Chapter 90-C of the General Laws of Massachusetts concerning "Citations."

SECTION 5. All members of the Department detailed to motorcycle duty shall patrol their post on their motorcycle at all times. During any rest period, they shall remain in conspicuous places, and shall, at no time, conceal themselves in an attempt to apprehend violators of motor vehicle laws.

SECTION 6. The Chief of Police shall designate a member of the Department to be "Safety Officer" who shall be assigned to the Traffic Bureau. The Safety Officer shall work constantly toward the improvement of traffic safety education in the schools, in civic, fraternal, church, and other groups and organizations, and shall perform such other duties as may be prescribed by the Chief of Police.

SECTION 7. The Captain in charge of the Traffic Bureau shall be responsible for the proper keeping and disposition of all Traffic Bureau evidence.

SECTION 8. The Meter Maids shall be under the supervision of the Commander of the Traffic Bureau.

RULE 12. GENERAL RULES OF THE DETECTIVE, CRIME PREVENTION, YOUTH AID & TRAFFIC BUREAUS

SECTION 1. The Captains in charge of the Detective Bureau and Traffic Bureau and the Commanding Officer of the Youth Aid Bureau shall report to their Deputy Chief and shall keep him informed on every matter of importance pertaining to the Department.

SECTION 2. Every member of the Detective, Crime Prevention, Youth Aid and Traffic Bureaus shall keep written notes of the work performed by him, and all members of bureaus must cooperate with other members for the purpose of increasing the efficiency of the Department.

SECTION 3. Every member of the subject bureaus shall, outside of the subject bureaus, refrain from discussing any of the business of the subject bureaus without the specific consent of the Commanding Officer in charge of the bureau, and shall never, under any circumstances, reveal to any person any of the business of the Police Department for publication, because of the grave injury that may be done to the efforts of various branches of the Department in the solution of crimes.

SECTION 4. The Captains in charge of the Detective Bureau, Crime Prevention and Traffic Bureaus, and the Commanding Officer of the Youth Aid Bureau shall be responsible for the proper keeping of all records of their respective bureaus.

SECTION 5. The Detective, Crime Prevention, Youth Aid and Traffic Bureaus shall be comprised of such personnel as may be designated by the Chief of Police.

SECTION 6. When there is question regarding to which bureau a case or investigation should be assigned, the Chief of Police or a Deputy Chief of Police shall be consulted and he shall designate the investigating authority.

RULE 13. POLICE ACADEMY

SECTION 1. The Captain or Superior Officer in charge of the Police Academy shall, under the direction of the Chief of Police, serve as coordinator of the Police Academy. He shall be responsible for the training and retraining of police officers and cadets and shall recommend curricula, form faculty, serve as instructor, schedule classes, and conduct recruiting and public educational programs.

SECTION 2. The Captain in charge of the Police Academy shall be responsible for keeping official records of the Academy and shall prepare reports and summaries of activities of the Academy when so ordered by the Chief of Police.

RULE 14. SERGEANTS

SECTION 1. Sergeants assigned to street duty shall have immediate charge of all Police Officers in their squads during their tours of duty; they shall see that all the orders and instructions to the Police Officers in their squads are obeyed; give such necessary instructions as may be required to that end, and will be held responsible for the appearance and discipline of the Police Officers under them while on duty. Before beginning a tour of duty, Sergeants shall familiarize themselves with all important pending matters.

SECTION 2. At roll call, when a Sergeant inspects his platoon or squad, he shall make certain that they are in condition to perform the duties; that their appearance is satisfactory; that they know their assignments; and that each man is carrying the authorized regulation badge, identification card, revolver in working condition, the required cartridges, handcuffs, police club, box key, notebook, pen and required equipment. He shall inspect the revolvers of the men in his platoon or squad when ordered to do so by his commanding officer and report to him as to their condition.

SECTION 3. It shall be the duty of Sergeants to take action to see that Police Officers receive, warrants, summonses, subpoenas, and other official papers and serve or deliver, or perform their other duties regarding such papers promptly and accurately.

SECTION 4. Unless otherwise ordered, the Sergeants' duty shall be to constantly patrol, within his assigned district, faithfully and unaccompanied by any other person, except when permitted by the officer in charge of the watch for proper purposes visiting each Police Officer at least once during the tour of duty when practical, with frequent changes in the order of visitation. He makes certain that Rules and Regulations are observed and that all orders and instructions relating to police work are obeyed. He makes calls as directed by his Commanding Officer for orders and instructions from such Commanding Officer. The Sergeant makes diligent investigation of the reason for absence from an assigned post on the part of a Police Officer.

SECTION 5. The Sergeant assigned to street duty shall keep a memorandum book in which he records the date, time and place of meeting each Police Officer and all incidents and matters relating thereto. When requested, he shall produce this book for official inspection. His entries must be complete and legible to others and must be retained for at least five years.

SECTION 6. Sergeants shall make written reports to their Superior Officer when so requested.

SECTION 7. Sergeants shall make certain that Police Officers receive notification of all complaints, and that they take proper police action, giving them such instruction and advice as the circumstances require. The Sergeant or superior officer assigned to Court duty is especially responsible for the appearance and conduct in Court of the Police Officer under his supervision. He assists and instructs them in such matters, and takes notice of their punctuality, of their methods, and of any criticism of them by the Courts. He reports to his Commanding

Officer any lack of competence, inability to learn, or unfitness for duty on the part of any subordinate, as well as any capability which the latter may display.

SECTION 8. The Sergeant shall immediately go to the scene of any homicide, serious crime, fire or major accident which occurs in his assigned area and keep his Commanding Officer informed of developments. Pending arrival of superior officers, he takes charge at the scene and does all in his power to see that all precautions are taken to obtain and preserve evidence, to secure witnesses, and to effect the arrest of perpetrators wherever crime has been committed.

RULE 15. POLICE OFFICER

SECTION 1. Every Police Officer must treat his superiors with respect, and his demeanor to his associates on the force must be courteous and considerate. It shall be every Police Officers duty to report to an officer of rank or a superior officer every case of neglect or disobedience of orders that may come to his knowledge. He must not criticize or discredit any orders given by his superiors or methods employed in the Service of the Department and, at all times, must promptly answer the calls and obey the orders of his superior officers.

SECTION 2. Every Police Officer, when on duty, shall be present at the time appointed for roll calls and drills. At each roll call, each police officer shall procure and study a copy of the daily police bulletin. He shall listen attentively to the orders and instructions of his Commanding Officer, and shall make a written memorandum of such information concerning person wanted, stolen automobiles, etc. Police Officers immediately after their roll call, shall proceed to the post assigned them. At the end of his tour of duty, the Police Officer shall proceed to the police station and hand in his report in person to the officer of rank or superior officer in charge, and shall remain

until the report has been stamped approved by him. No street Police Officer shall leave his post at the end of his tour of duty prior to a time designated by his Commanding Officer.

SECTION 3. Police Officers and motor vehicle operators must not loiter, but shall (except in case of fire, arrest of a prisoner, or other cause of necessary absence) continually patrol their post and shall confine their patrol within the limits of their posts unless ordered elsewhere by their superiors.

SECTION 4. Because the Police Officer serves the entire City, and not merely a particular place or post, it is his duty to give proper attention to violations of law committed in his sight anywhere within the City, especially such as involves injury or the risk of injury to person or property.

SECTION 5. When obliged for police purposes to leave his post by going upon another post or by entering a building or other premises on his own post, the Police Officer upon his return, shall report to his Commanding Officer the cause and length of the absence. Before leaving his route, by entering a building or otherwise, for any other purpose, he shall secure directly or by radio or telephone the permission of his absence, and naming the place to which he intends to go. When permission is given, he reports at once upon his return to this post. If conditions are such as to make it impracticable to secure permission in advance, a Police Officer who leaves his post reports immediately on his return to his Commanding Officer the cause and length of his absence.

SECTION 6. When a Police Officer becomes sick or injured during his tour of duty, he shall notify his Commanding Officer immediately.

SECTION 7. During his tour of duty, when asked questions, he shall respond with courtesy avoiding, as much as possible, entering into idle conversation. He especially avoids giving cause for gossip or scandal by conversing with women in the streets at night when he is in uniform, whether on his post or

not. He constantly patrols his post except for halts necessary to the proper performance of his duty, he does not sit down, lean against walls, posts, or trees, or conduct himself in any respect other than as a responsible official exposed to public observation and criticism and with important work to do.

When assigned to crossings he gives his entire attention to such duties, avoiding all unnecessary conversation. He renders such aid as may be consistent with his duty to persons requesting it. He keeps his badge in sight and furnishes his name and badge number to all persons who demand them. He exhibits his identification card when lawfully requested to do so for identification purposes. He directs strangers and others, when requested, of the nearest and safest way to their places of destination. If he hears a call for assistance, he proceeds to render aid with all dispatch, taking every practicable precaution for the protection of his post when he leaves it for this or for any other purpose. When any way becomes blocked by vehicles, he, using his best judgment, aids in disentangling the same. When the stream of travel is continuous, he opens a way for foot travelers, attending especially to women, children and aged persons wishing to cross.

SECTION 8. When a disturbance occurs, the Police Officer instantly proceeds to the spot and uses his best efforts to restore quiet. If any person has committed any crime for which an arrest is allowed by law, or by loud outcries, or otherwise persists in disturbing the peace, the person so offending may be arrested. Police Officers shall see that sidewalks are not obstructed by persons loitering thereon.

SECTION 9. The Police Officer shall make note of all vehicles which in any manner excite suspicion. So far as possible, he attends at school building on his post before and after the sessions for the purpose of preserving order and protecting the children from injury.

Insofar as he can, without intruding on the privacy of individuals, the Police Officer notes all movements into and remov-

als from the limits of his post, and shall also note the condition of the streets, alleys, courts, blocks, halls, and hallways thereon and all other matters of value to the Department and in his daily report, shall call attention to any violation of law or ordinance which he has observed and any dangerous condition of either streets or buildings. He shall note and report all street and sidewalk obstructions (removing them when practicable), all places where accidents occur, all places where temporary permits are granted for buildings, or where openings or excavations are made, and shall see that a safe and suitable way is provided for the public travel. He acquires sufficient knowledge of the residents of his post as will enable him to recognize them. He makes himself thoroughly acquainted with all parts of his post, and with streets, thoroughfares, private ways, houses, buildings, stores, and business concerns included in it. He constantly observes the conduct of all premises they enter, learns their names, residences and occupations, and reports to his commanding officer any useful information he may obtain concerning them. He fixes in his mind all characteristics necessary to identify them.

SECTION 10. The Police Officer takes particular notice of all places where intoxicating liquors are sold and reports all unlicensed places and all places where the terms of the license under which the liquors are sold are not fully met. He notes all junk shops, all shops of second-hand dealers and pawnbrokers, all gatherings which are contrary to law, all places of amusement, all licensed persons and places within his post, as well as gambling houses, dancing, or prize-fighting places, mock-auction rooms, places for the licensed sales of lottery tickets, narcotic drugs, and houses of ill fame, keeping a list of them in his book for reference and reporting them to his commanding officer. He shall make a written report of all disturbances at, in or near liquor establishments.

SECTION 11. The Police Officer notes all street lights out of repair, not lighted at proper times, or extinguished too early or too late. He notes all buildings erected, or in the process of erection contrary to law, or any building defectively built, or which has become unsafe, or in which any noisome, dangerous, or unwholesome trade is carried on and reports them to his commanding officer without delay.

SECTION 12. A Police Officer shall observe all business places on his post or district and shall note the location of safes, cash registers, nightlights, alarm systems, habits of staff, time of opening and closing, nature of business, number and location of exits, and means of locking doors, windows, gratings and skylights.

A Police Officer shall, at night and during the time business houses are closed, exercise the greatest vigilance, giving particular attention to business houses and vacant or unoccupied building and dwellings. He shall examine and try accessible doors, windows and grating and shall, at once, investigate all suspicious and unusual circumstances, such as open doors, lights out over safes, and open safes. In the daytime, he shall examine, in a like manner, all vacant or unocccupied buildings and dwellings on his post or district.

When a door or window is found open, on any tour of duty, a Police Officer shall enter the building, if possible, make a thorough investigation and determine, if possible, whether burglary or other crime has been committed and whether the door or window can be secured. On discovering that a forced entry has been made into a building, the police officer should enter such building and make a thorough search for any person or persons unlawfully therein or injured therein. He shall, if necessary, summon assistance to examine the premises and to secure such doors and windows. He shall notify his commanding officer of each such finding immediately, and if upon orders of his commanding officer, any door or window is

secured in the absence of the owner or his representative, a note shall be left in a conspicuous place setting forth the official action taken. A Police Officer shall notify headquarters by radio prior to entering any vacant, unoccupied or commercial building when the owner or his representative is not present. A Police Officer shall be held accountable for failure to discover or report any doors or windows of business building, vacant or unoccupied buildings and dwellings which have been broken open on his post or district during his tour of duty.

A Police Officer is vigilant to prevent fire or waste of water and to see that fire escapes are not obstructed. He calls the attention of the abutters to the state of the sidewalks and roofs, where, by snow, ice, or other cause they are rendered dangerous, or when obstructed by fuel boxes or other articles or with goods, or where ashes, garbage, dead animals or other offensive matter is thrown into the street. If the laws, ordinances, orders, rules or regulations governing such cases, upon notice given, are not forthwith obeyed, the Police Officer ascertains the names of the parties offending and reports the same for complaint and prosecution.

SECTION 13. A Police Officer carefully preserves any property which comes into his possession and his official capacity and affixes to it a proper tag. All money or property coming into the possession of any member of the Police Department, by virtue of his office, whether lost, abandoned, recovered, or to be used in evidence, shall be delivered to the officer designated by the Chief of Police to receive the same, and it shall be kept in his custody until such time as he may be directed to deliver it to the owner or other proper person. A description of all such property shall be recorded and preserved in such a manner as to identify it at anytime.

SECTION 14. A Police Officer shall cause all children, insane or demented persons who have strayed and are wandering the streets, if they are known to him, to be taken to their

home provided they reside within or near the limits of his post; otherwise, they shall be taken to the station. He shall direct all persons who are in need or want that may come to his notice, to some charitable organization. In case of sudden deaths, accidents, or drownings, he shall render immediate first aid, if possible, shall report the same immediately to his commanding officer, and ascertain all important particulars in reference thereto and make a report of same to his commanding officer in writing.

SECTION 15. A Police Officer shall take cognizance of all violations of the laws governing the operation of motor vehicles, offenses of cruelty to animals, etc., and make an arrest when proper and allowed under the law; otherwise, he shall obtain the necessary and pertinent information and make a full report to his commanding officer.

SECTION 16. A Police Officer shall ascertain the purpose of any person found begging on the street or going from door to door soliciting alms. If satisfied that the person is not a vagrant or tramp, he shall, under the proper circumstances, direct such person to a charitable organization. He shall pay particular attention to persons found peddling without a license and shall under proper circumstances make an arrest; otherwise, take their name and residence and report the same, together with the circumstances, to his commanding officer in writing.

SECTION 17. A Police Officer shall bear in mind that often, where one person directly charges another with felony, the officer is not protected in making an arrest without a warrant unless the charge is reasonable and the officer believes the person arrested to be guilty.

SECTION 18. When it becomes necessary for an officer to make an arrest, he shall do so as quietly as possible. He may use any force necessary that is reasonable and proper to overcome any resistance offered in making arrests; although in arresting a person no more force shall be used than is absolutely necessary for the safe custody of the prisoner or for overcoming any resistance that may be offered. Any abuse of prisoners, either by word or act, will be severely punished. If an officer finds his personal efforts insufficient to effect an arrest, or if he has reason to anticipate that resistance will be made, he may, in the name of the Commonwealth of Massachusetts, demand the aid of any person present.

SECTION 19. Since by virtue of his appointment, a Police Officer can act officially in CRIMINAL MATTERS ONLY, HE SHOULD NOT RENDER ASSISTANCE IN ANY CIVIL CASE WHATEVER, except to prevent a breach of peace or to suppress a disturbance actually commenced. When an ejectment is made for non-payment of rent, or any other cause, or when disputes arise between parties upon civil matters, the officer should not give assistance to either, unless it be necessary to prevent a breach of the peace or to quell a disturbance. His duty on such occasions is merely to take into custody persons breaking the peace.

SECTION 20. A Police Officer has a right to break open the outer doors of any building, using no unnecessary violence or force for the purpose of searching for and arresting any person upon criminal process. But, he must first announce his office and purpose, demand admittance and wait a reasonable time before breaking in. He must believe and have reasonable cause to believe that the person against whom the process is directed is there. When a felony has actually been committed or a dangerous wound given, he may in like manner break

outer doors to search for and arrest the offender without a warrant. Without a warrant, he can justify breaking of the outer doors only, if the person he seeks to arrest is actually in the house. He may, in like manner, without a warrant, break outer doors to retake on fresh pursuit a prisoner lawfully arrested who has escaped, or to arrest persons who have committed an affray and flee and who are immediately pursued by him, and he has the right to arrest on fresh pursuit any person who has committed any misdemeanor in his presence for which he may lawfully arrest the latter, but in these cases he would be justified only if the person sought was actually in the house.

An Officer may, without a warrant, enter any house through an unfastened outer door where there is a noise inside amounting to a breach of peace and arrest any person engaged in an affray or committing an assault in his presence. He may break the outer door under these circumstances in the same manner as in other cases.

Inner doors are not afforded the same protection in law as outer doors. Wherever an Officer has gained entrance through outer doors, he may break inner doors.

SECTION 21. Every Police Officer shall keep a daily diary in which he shall record all matters of importance of an official nature occurring on his tour of duty and shall carefully preserve the same, and in case of his retirement, resignation, or discharge from the force, shall surrender same to the Department clerk. His entries must be retained for at least five years.

SECTION 22. Every Police Officer shall, each day, at such times and in such manner as shall be required, make a report of all important information that has come to his knowledge during the previous twenty-four hours or since his last report, exhibiting his diary if requested by an officer of rank or a superior officer. He shall in the above manner, make a written daily report of any matter referred to him individually or to the

members of the force collectively. The Police Officer shall report to their respective Sergeants, who shall in turn report to their commanding officers, accompanying their reports with the reports of their men and with such remarks endorsed thereon as may be necessary or desirable.

SECTION 23. When a Police Officer discovers a fire, he shall first ascertain if it can be extinguished without alarm, if not and if the fire is of such character as to require the services of the Fire Department, he should notify Headquarters by radio, ring in an alarm from the neareast fire alarm box at once and before attempting to extinguish the fire. He should then see that the firemen are properly directed either by himself or by another trustworthy person left at the box. He should note the time of the alarm, the box number, by whom rung in, location of the fire (street and number), part of the building on fire (first, second, third story, whole building), height of building by stories, material of construction (wood, brick, metal, stone), by whom owned, by whom occupied, whether used for dwelling or business and kind of business carried on, cause of fire, if known, the damage, and any other matters of seeming importance connected herewith or with the fire itself. He should make a complete report of all of the above information to his commanding officer.

At a fire, an Officer should assist in all practicable ways in the preservation of life, the protection of property, and the prevention of crime, but after the arrival of the first piece of fire apparatus, he should not enter a burning building except for the purpose of saving life or at the request of a superior officer of the Fire Department for the performance of a proper police service. No Police Officer shall leave the scene of a fire until excused by his Sergeant or Superior Officer.

During a fire, special attention shall be given to the streets and they should be kept free from vehicles and people so that the firemen shall not be obstructed in their work. Special atten-

tion shall also be given to the protection of property and the prevention of crimes. The Officer who arrives first at the scene of the fire shall have precedence and control over the other officers who may come, until an officer of rank or a superior officer arrives.

If reinforcements are needed, notice shall be sent at once to the station.

SECTION 24. Police Officers shall be on the alert for person who answer the description of missing persons and wanted criminals.

SECTION 25. POLICE OFFICERS WHILE ON DUTY SHALL DEVOTE THEIR ATTENTION TO THEIR POLICE DUTIES. THEY SHALL NOT CARRY UNAUTHORIZED ITEMS INCLUDING BUT NOT LIMITED TO RADIOS, TELEVISIONS AND OTHER ITEMS NOT DIRECTLY RELATED TO POLICE DUTIES ON THEIR PERSON OR IN A POLICE VEHICLE (INCLUDING MOTORCYCLES).

FOR THE PURPOSE OF THESE RULES AND REGULATIONS, THE DEFINITION OF POLICE OFFICER AS A MEMBER OF THE SPRINGFIELD POLICE DEPARTMENT, INCLUDES BOTH MALE AND FEMALE POLICE OFFICERS.

SECTION 26. The Officer, upon arriving at the scene of a personal injury, shall assess the nature of the injury and, if necessary, call for medical assistance. To the extent of their training, the officer shall treat the patient until medical assistance arrives. The patient may be transported in a Department vehicle only if the injury or illness is of minor nature. An ambulance will be used to transport patients because of medical necessity to prevent significant aggravation or deterioration of the patient's condition, or because the condition of the patient is unknown and could reasonably be suspected to warrant the use of the ambulance. When in doubt a call for an ambulance must be made.

The ambulance crew, upon arriving at the scene, will assume responsibility for the patient. The medical needs of the patient shall take precedence over all matters and the officer will assist the medical personnel to the extent possible.

Deviations from the above procedure will be allowed only for serious public safety considerations. In such a case, a report shall be transmitted as soon as practicable to the Chief of Police with the reason for such deviation.

RULE 16. MATRONS

SECTION 1. The Police Matrons shall, under the direction of the official in charge of the station, be in charge of the women's lockup. They shall, at all times during their tour of duty, give such attention as may be necessary to every woman or child prisoner to assure their well being. This shall include lost children brought to the station.

SECTION 2. The Matrons shall be subject to the Rules and Regulations of the Police Department. When on duty, they must not leave the Matron's quarters or the booking area without first obtaining permission from the official in charge.

RULE 17. POLICE RECORDS SYSTEM

SECTION 1. All records maintained by the Springfield Police Department shall be considered irreplaceable. No original document shall be released unless to an authorized individual. Only trained Records personnel shall be permitted to retrieve or replace records. No other member of the Department shall have access to the filing system of the Springfield Police Department.

SECTION 2. All divisions shall forward to the Records Division records and reports of all matters concerning arrests, trials, or information that is to be compiled for the Department.

Whenever the case has been adjudicated in Court, the Crime Prevention Bureau, the Youth Aid Bureau, Detective Bureau, and Traffic Bureau shall forward, as soon as possible, to the Records Division, all reports that have been compiled regarding the individual and the investigation.

SECTION 3. The Records processing area shall be physically secured from unauthorized personnel and files and other storage devices shall be designed to prevent tampering or pilfering if left unattended.

SECTION 4. The Records access policy must be compatible with Department policy, govern relations with the news media, and with rules established by the Courts and the Criminal History Systems Board.

SECTION 5. Police Officers requiring copies of reports for Court appearance shall request, in writing, the proper number of copies in advance of the trial date.

SECTION 6. The Records Division shall prepare a monthly statistical report for the Chief of Police and other commanding officers that may need them, information pertaining to their division, upon request from the commanding officer.

SECTION 7. Whenever a warrant is received requiring prompt service of a warrant, except where a Division Commander otherwise directs in any particular case, it shall be forwarded to the Central Records Division so that it may be logged, numbered, and filed. No warrant shall be allowed out unless it has been recorded, and the name and date that the individual officer has taken and requested the same. After service of a warrant that was not filed in the Records Division due to the order of a Division Commander, the Commander shall report to the Records Division that such a warrant was obtained and served.

RULE 18. ADMINISTRATOR

SECTION 1. The Administrator shall keep, or cause to be kept, on individual cards a complete record of every member of the Department, and all books and records pertaining to the administration of the Department's business. The Administrator shall have general supervision of the Clerk's Office and employees assigned thereto.

SECTION 2. The Administrator shall, annually, between the first and fifteenth day of January, transmit to the Chief of Police a full and correct synopsis of the police work accomplished during the year ending December 31st.

RULE 19. SUPERINTENDENT OF POLICE SIGNAL SYSTEM

SECTION 1. The Superintendent of the signal system shall have general supervision of the police signal system, the control and direction of all electricians, inspectors, and linemen and other employees engaged in the construction and maintenance thereof.

SECTION 2. He shall see that the instrument, batteries, lines and boxes are kept in proper order and constantly ready for service. He shall be immediately notified of any defects in the system and shall take prompt measures to remedy the same.

SECTION 3. Annually, between the first and fifteenth day of December, he shall transmit to the Board of Police Commissioners through the Chief of Police, a full and concise statement of all materials and appliances which, in his opinion, will be required for the police signal system for the ensuing year, including a statement of the estimated cost of same.

RULE 20. POLICE GARAGE

SECTION 1. There shall be an officer of rank or a superior officer assigned as supervisor in the police garage, and he shall, under the direction of his Deputy Chief, have charge and supervision of the repairs and general condition of the automobiles, motorcycles apparatus, equipment, and any needed repairs noticed by the operators of such automobiles, motorcycles, apparatus and equipment shall be promptly reported to him.

SECTION 2. Minor repairs shall be done by all officers assigned to the police garage on their tours of duty.

SECTION 3. Officers assigned to the police garage for duty will be held responsible for the condition of cleanliness of the garage and those vehicles assigned to them during their tour of duty.

SECTION 4. Officers assigned to the police garage shall, at all times, exercise due care in the control and operation of any motor vehicle of the Department. They shall strictly comply with Massachusetts General Laws, Chapter 89, Section 7B which reads as follows: "The driver of a vehicle of a fire, police, or recognized protective department, and the driver of an ambulance shall be subject to the provisions of any statute, rule, regulation, ordinance or by-law relating to the operation or parking of vehicles, except that a driver of fire apparatus while going to a fire or responding to an alarm, or the driver of a vehicle of a police or recognized protective department, or the driver of an ambulance, in an emergency and while in performance of a public duty or while transporting a sick or injured person to a hospital or other destination where professional medical services are available, may drive such vehicle at a speed in excess of the applicable speed limit if he exercises caution and due regard under the circumstances for the safety of persons and property, and may drive such vehicle through

an intersection of ways contrary to any traffic signs or signals regulating traffic at such intersection, if he first brings such vehicle to a full stop and then proceeds with caution and due regard for the safety of persons and property, unless otherwise directed by a police officer regulating traffic at such intersection."

SECTION 5. The Officer of rank or superior officer assigned as supervisor in the police garage shall be responsible for the proper keeping of all records in connection with the automobiles, motorcycles, apparatus, and equipment of the Department.

SECTION 6. No privately owned motor vehicles shall be permitted in the garage except on proper police business.

RULE 21. RADIO ENGINEER

SECTION 1. The radio engineer of this Department shall possess at least a second class radio-telephone operator's license as issued by the Federal Communications Commission. The Chief of Police through his assigned Deputy shall have complete control and authority over the radio engineer.

SECTION 2. The radio engineer shall be responsible for the proper installation, alteration, maintenance, repair, and operation of all radio equipment of the Department including main base transmitters and receivers, departmental remote control units, pickup receiver relays, emergency generator, air-raid siren activator, testing and monitoring panel batteries, and related equipment. He shall see that all radio equipment is kept in proper order. He shall be immediately notified of any defects, breakdowns, or other trouble with radio equipment and shall take prompt action to remedy the same.

SECTION 3. The radio engineer shall supervise and participate in the installation, alteration, repair, and maintenance of mobile receiving and transmitting units in vehicles of municipal departments served by this Department.

SECTION 4. The radio engineer shall be responsible for locating and diagnosing failures, malfunctions of radio and related electrical and mechanical equipment, and shall test, dismantle, adjust and repair defective equipment. He shall periodically operate and adjust emergency transmitters to insure effective readiness. He shall maintain a continuing technical review of the adequacy and efficiency of the system, and shall study and experiment with developments in the field to determine practicability and make recommendation as to incorporation in the system.

SECTION 5. The radio engineer shall design, develop, install extensions and alterations, prepare specifications, diagrams and plans for the radio system of this Department. He shall interview salesmen and requisition radio equipment and supplies. He shall be responsible for the conformance of the system with Federal Communications Commission regulations, and shall compile engineering data required by the Federal Communications Commission. He shall make periodic frequency measurements of station output and adjust the frequency stability if its out of tolerance, and he shall investigate complaints of interference.

SECTION 6. The radio engineer shall instruct Department radio operators in procedural changes for more effective broadcasting and personnel of various City departments served in minor maintenance and service procedures.

SECTION 7. The radio engineer shall confer and cooperate with officials of municipal departments in connection with matters relating to the system. He shall perform related work as required by the Chief of Police.

SECTION 8. Annually, between the first and fifteenth day of December, the radio engineer shall transmit to the Chief of Police a full and concise statement of all materials and appliances which, in his opinion, will be required for the police radio system for the ensuing year, including a statement of the estimated cost of same.

SECTION 9. The radio engineer is subject to all the Rules and Regulations of the Department.

SECTION 10. The radio engineer shall be responsible for the proper keeping of records in connection with radio equipment of this Department and the operation thereof.

RULE 22. RADIO CARS, MOTOR VEHICLES, & WALKIE-TALKIE RADIOS

SECTION 1. Members of the Department assigned to operate automobiles or motorcycles are accountable for the proper care of such vehicles and equipment assigned to them. Except by authority of an officer of rank or a superior officer, they shall operate only the automobile or motorcycle assigned to them. Standard equipment furnished by the Department shall not be changed or altered and nothing shall be added thereto or taken therefrom. They shall not leave their machines unattended, except when necessary in the performance of police duty.

SECTION 2. No one shall be allowed to ride in police automobiles other than on official police business except members of the Department, unless by permission of an officer of rank or a superior officer.

SECTION 3. Members of the Department will be held strictly accountable for the condition of automobiles and motorcycles assigned to their use, and shall make daily inspections of the motor vehicles assigned to them. Minor repairs such as the changing of a tire, etc., and such other minor adjustments as may be necessary shall be made by the operators. Any other repairs shall be done under the supervision of the officer of rank or superior officer in charge of the police garage. Department automobiles and motorcycles shall be stored at the station house, but commanding officers may permit members of the Department to store the motor vehicles of the Department elsewhere when necessary.

SECTION 4. Department motor vehicles will not be taken out of the City without permission of the Chief of Police or a Deputy Chief, except in case of emergency. In such emergency, a report will be forwarded to the Chief of Police within twenty-four hours stating the necessity of such emergency.

The Detective Bureau, Crime Prevention Bureau and Youth Aid Bureau motor vehicles may leave the City to pick up a prisoner in another City or County at the discretion of the Commanding Officer of the Bureau with the Commanding Officer of the Uniform Squad being notified.

SECTION 5. Automobiles assigned to a specific branch of the service will not be diverted from that service without permission of the Chief of Police or a Deputy Chief of Police.

SECTION 6. All members of the Department operating Department motor vehicles, shall strictly comply with the provisions of the Massachusetts State Laws, traffic regulations and Ordinances relating to vehicular traffic and the provisions of Rule 20, Section 4 to this book of Rules and Regulations. No member of the Department shall operate a Department motor vehicle without being properly licensed by the Registrar of Motor Vehicles.

SECTION 7. The operator of a Department motor vehicle shall, as soon as possible, report in writing, to his commanding officer in regard to any accident involving such vehicle.

SECTION 8. Radio cruising car operators reporting off duty will stay with their car until relieved by replacements. When cars are brought in for a change of crews, they should be parked so that the rear can be opened and made easily accessible. Car interiors should be cleaned of debris and exteriors gone over with a cloth when necessary. This shall be done by cruising car operators at the end of their tour of duty.

SECTION 9. Except in an emergency, a radio car should never be left unattended. The radio cars shall be operated in

such a manner as to enable approach to the scene of a reported crime quietly, and operators of such cars shall not use sirens unnecessarily while responding to emergency calls. When proceeding to the scene of any emergency, the crew shall be alert and observant in an effort to detect suspicious persons or automobiles coming from the general direction of the scene of the emergency. If the address given over the radio is not the actual location of the supposed crime, the members of the radio car responding will forthwith endeavor, by inquiry and observation, to find the premises in which the supposed crime was committed.

SECTION 10. All officers who have been assigned a portable radio, shall be continuously in touch with the radio dispatcher. Under no circumstances shall radio contact with the radio dispatcher be cut off without permission of the commanding officer.

SECTION 11. Officers assigned a portable radio, shall be responsible for its care and operation. Any tampering of radio equipment shall result in disciplinary action. Any damage to equipment or loss of same due to negligence will be the officers financial responsibility.

SECTION 12. Officers assigned to portable radios shall immediately acknowledge calls received on his radio unit. All assignments shall be carried out immediately or as directed.

SECTION 13. All members of the Department using radio equipment shall comply with all rules of the United States Federal Communications Commission applicable thereto, and to the extent that any Rule or Regulation of this Department or any order issued in this Department is inconsistent with any applicable rule of the Federal Communication Commission, the latter rule shall govern.

RULE 23. HIGH SPEED PURSUIT

SECTION 1. Definition

The definition of a High Speed Pursuit is the motorized pursuit of another vehicle of speeds above the legal speed limit.

SECTION 2. Pursuit Guidelines

a. Upon initiating pursuit, the Police Officer shall immediately contact Headquarters by radio with following information:

1. Identity of the Officers unit

2. The license number and other identifying characteristics of the vehicle and/or the occupants he is pursuing.

3. The offense committed by the pursued vehicle.

4. The exact location and direction of travel of the pursued vehicle.

5. The officers should utilize the vehicle horn and activate the emergency dome light.

6. If the pursued vehicle fails to stop the siren will be utilized.

7. The main criteria for a continuous high speed pursuit shall be whether the pursuing officer has reasonable grounds to believe that the person pursued has committed a serious felony or any felony involving the use of threat of physical force.

SECTION 3. Obligation of the Police Officer

a. Police Officers of the Springfield Police Department shall make every reasonable effort to apprehend a fleeing violator, but pursuit should not be carried to such an extent as to appreciably endanger the lives of innocent users of our streets and highways and the officer himself.

b. The Police Officer in pursuit shall coherently and concisely continue to broadcast the location and direction of the pursued vehicle via radio contact.

c. The strobe light and siren shall be activated during the high speed pursuit.

d. The Police Officer on command of the Commanding Officer to abort the high speed chase shall do so at once.

e. The Police Officer shall submit complete written reports to the Chief of Police regarding any high speed pursuit regarding the circumstance pertaining to the high speed chase regardless of whether or not it was aborted.

SECTION 4. Responsibility of the Commanding Officer

a. All continuous high speed chases, shall be monitored and controlled by the Commanding Officer on duty at Police Headquarters at the time.

b. The Commanding Officer shall assume personal control of the situation and after evaluation he shall determine whether the high speed chase shall continue or abort.

c. The Commanding Officer shall assign only those support units that he deems necessary to assist in the pursuit.

d. The Commanding Officer shall make a written report to the Chief of Police regarding the circumstances of the pursuit and the outcome.

SECTION 5. Duties of the Radio Dispatcher

a. The radio dispatcher upon receiving the initial call shall immediately notify the Commanding Officer of the chase situation.

b. The radio dispatcher shall record the time the pursuit began and the time when terminated.

c. The radio dispatcher shall record the time that the Commanding Officer gave the order to abort the pursuit.

d. The radio dispatcher shall submit a special report to the Chief of Police at the end of his tour of duty whenever a chase is instituted and completed or aborted.

SECTION 6. Pursuit to be Aborted

a. Whenever the risk of danger to the public or to the Police Officer is high, the pursuit is to be aborted.

b. When the weather conditions are poor and the road conditions are bad, the pursuit is to be aborted.

c. When an unmarked police vehicle is in pursuit of a vehicle and a marked vehicle becomes involved, the unmarked police vehicle shall abort the pursuit.

d. The Police Officer shall submit a written report to the Chief of Police regarding the circumstances of the pursuit.

e. The dispatcher shall, when the Commanding Officer orders a chase aborted, call each individual car and notify them individually to abort the chase and to make sure that the operator responds vocally that he acknowledges the abort order.

SECTION 7. Vehicle Occupied Restriction

a. Whenever the police vehicle is occupied by prisoners, witnesses or other personnel besides the Police Officer, they will not engage in a high speed pursuit.

SECTION 8. Short Duration Pursuit

a. The guidelines regarding the continuous high speed pursuit are not meant to deter the high speed chase situation of short duration which is so often necessary in traffic violation enforcement or cases involving misdemeanors.

b. The Police Officers should attempt to apprehend quickly and yet avoid a high speed chase by:

1. Obtaining the attention of the occupants.
2. Utilizing the vehicle horn, strobe light and then the siren.
3. Pull along the side of the pursued vehicle for a short distance, if possible and feasible to direct a stop at a safe location.

c. If the pursued vehicle does not stop as directed, a continued high speed pursuit will be permissible only under the guidelines listed under Rule 23.

RULE 24. SPECIAL POLICE & AUXILIARY POLICE

SECTION 1. The Board of Police Commissioners may, upon the written application of any responsible firm or person, appoint suitable persons to be special police officers. The appointment of such special officers may be revoked at any meeting of the Board of Police Commissioners without charges or hearing.

SECTION 2. Every special police officer appointed under the provisions of the law, shall have while his appointment is in force the power of a police officer to preserve order and enforce the laws and the Ordinances of the City, in and about the premises or locality specified in his appointment. These appointments must be renewed annually. Persons whose appointments have expired and have not been renewed will be liable to prosecution if assuming to act as special police officers.

SECTION 3. No person shall be appointed to a special police officer who is not a citizen of the United States, who is not of good moral character, or who has ever been convicted of a felony.

SECTION 4. Special police officers shall be supplied with a suitable badge by the Administrative Assistant for which they shall pay the cost price, and which they must turn into the Department Administrative Assistant when they cease to be a special police officer, at which time the money advanced for such badge will be returned.

No special police officer shall wear a uniform which, in the opinion of the Board of Police Commissioners, is similar to the

uniforms of the regular members of the Department, nor shall they display the word "police" on their uniforms or equipment except for the badge issued to them from the Department. The uniforms, badges, and equipment, as well as the activities of special police officers, are subject to the approval of the Chief and the Board.

SECTION 5. No special police officer shall perform duty for any person, firm, or corporation other than the one for whom or which he is appointed, nor at any place except the place designated in the application for his appointment, except by special permission in writing, from the Chief of Police.

SECTION 6. Special police officers shall be subject to the Rules and Regulations of the Police Department when on police duty.

SECTION 7. The Auxiliary Police force of the Springfield Police Department shall be under the complete control and command of the Chief of Police. It shall be comprised of such members as may be allowed by the Chief of Police. The activities of the Auxiliary Police shall be limited to those allowed by the Chief of Police. The uniforms, badges, etc., of Auxiliary Police are subject to the approval of the Chief of Police.

SECTION 8. All members or proposed members of the Auxiliary Police must make application to the Board of Police Commissioners annually, through the Chief of Police, for appointment as special police officers. Failure of the Board of Police Commissioners to grant such appointment to a proposed member shall prohibit such person from membership in the Auxiliary Police. Failure of the Board of Police Commissioners to reappoint a member of the Auxiliary Police as a special police officer shall mandate such members immediate resignation or discharge from membership in the Auxiliary Police.

SECTION 9. Auxiliary Police shall be subject to the Rules and Regulations of the Police Department when on police duty.

SECTION 10. No Auxiliary Police Officer shall perform duty for any person, firm, or corporation, nor shall he use any vehicle whatsoever while in the performance of police duty other than when authorized to do so by the Chief of Police.

RULE 25. STATION HOUSES

SECTION 1. Members assigned to office duty and telephone operators when answering telephone calls shall be civil and courteous in their speech with all people with whom they converse and to those who may come to the office to make complaints or seek information.

SECTION 2. Officers so assigned shall visit the prisoner in custody every half hour of the day and night during their tour of duty, and on each such visit shall punch the time clock.

SECTION 3. It shall be the duty of the Commanding Officer on duty to see that the recording instruments are in proper order and report immediately any defect to the radio engineer.

SECTION 4. Members of the Department assigned to office duty, shall attend every roll call of their squad and after roll call, relieve the members of the Department assigned to office duty then on duty.

SECTION 5. The station houses shall be used exclusively for police business. Civility and attention shall always be shown to any person who may come there on business. No person, other than members of the Department, shall be permitted to remain in the station without permission of the official in charge.

SECTION 6. The photographs of all persons collected for the use of the Department shall be privately kept and shall not be exhibited to any person other than members of the Department, except by permission of the Chief of Police or the detectives. Neither correspondence, photographs, evidence, nor information relating to police business shall be given to any person

for publication, except for the purpose of aiding the Department in the prosecution of its work, and with the permission of the Chief of Police or official in charge.

SECTION 7. A map of the entire City shall be maintained at the dispatchers station. This map shall show the boundaries of radio sectors to enable the dispatcher to immediately ascertain the radio-equipped units which are located within the shortest distance from any given point.

SECTION 8.

A. No personnel not specifically assigned to the Booking Section be allowed into this area without the authority of the supervisor in charge of the area.

B. The Arresting officers shall leave the booking area immediately after delivery of their prisoner.

C. The supervisor in charge shall not allow anyone except personnel assigned to this area to search or process a prisoner, except in an emergency.

D. The supervisor in charge shall not allow anyone except personnel assigned to this area to search or process a prisoner, except in an emergency.

SECTION 9. The strictest economy consistent with regard for the comfort of the men and the transaction of business shall be taken and observed in the use of fuel and light, and care shall be taken that the property and furnishings of the Department shall neither be wasted, injured, nor destroyed.

SECTION 10. No person will be allowed at roll call except members of the Department unless by permission of the Chief of Police or official in charge, and such permission shall be given only in extraordinary cases.

SECTION 11. The use of the indoor shooting range of the Springfield Police Department shall be limited in use to the members of this Department. No other person, agency, group, or organization shall be permitted to use such range without the express permission of the Chief of Police or a Deputy Chief

of Police. No one shall be permitted to use the range unless accompanied by at least one other Department member.

SECTION 12. No member of this Department or other departments or agencies, shall, while carrying a firearm or other weapon, enter into any cell block, detention room or other place of detention within this Department.

SECTION 13. In all cases where physical evidence is held, it shall be the responsibility of the commanding officer of the respective bureau or squad holding the same to make certain that it is properly marked, stored, and retained until placed in the custody of the property division. No physical evidence shall be left lying on or about any desk, table, floor, or otherwise left in a careless manner. Upon the return of physical evidence or the release of physical evidence, the commanding officer of the respective bureau or squad shall make certain that a proper receipt is obtained for same. In the case of perishable evidence, the commanding officer shall make certain that an appropriate disposal of the same is made.

SECTION 14. All personal property, including money, which comes into an officer's custody while on duty, whether lost, stolen or turned into the Department, shall be suitably tagged, recorded and turned over to the property officer or his designee for safe keeping in accordance with established property division procedures. A receipt shall be furnished to officers turning property over to the property officer or his designee.

Exceptions to the above procedure shall include personal property taken from a prisoner at the booking desk — such property shall be stored in the property room adjacent to the booking desk. Further, narcotic drugs and alcoholic beverages held for analysis shall be exempt from the procedures set forth in the first paragraph — the Captain of the Crime Prevention Bureau shall be responsible for the safekeeping of these items and issuing a receipt to the officer turning this type of property in to the Crime Prevention Bureau.

In the case of a motor vehicle being ordered towed or coming into the custody of the Springfield Police Department, the following procedure will take place:

(a) An approved Departmental Tow Sheet will be filled out in a proper manner indicating all required information.

(b) The officer or officers are to inventory in a caretaking function, the contents of the motor vehicle and record in the appropriate spot on the tow sheet any damage to the vehicle or contents and list the vehicle contents in all unlocked compartments.

(c) In the event that the trunk and glove compartment is locked, that notation will be made.

The purpose of this section is threefold:

1. The protection of the owner's property while it remains in police custody.

2. The protection of the police against claims or disputes over lost or stolen property.

3. The protection of the police from potential danger.

SECTION 15. The Forest Park Station will be manned as needed. Assigned personnel direct or otherwise, will report to the Squad Commander of their arrival and departure.

Personnel assigned to the Forest Park Station will be checked by the District Supervisor and he will include the time and location in his report to the Chief of Police.

RULE 26. PRISONERS

SECTION 1. When a prisoner is brought to the station, his name and complete description shall be taken before he is put in the lockup (if possible to do so) and everything in his possession, which would be harmful to himself or others, shall be taken from him and safely kept by the Superior Officer or officer of rank in charge of the Booking Section at the time of arrest. All property taken from a prisoner when booked must

be turned over to the official in charge of the station at the time of arrest, together with a list of such property. Such property, while in the custody of the Superior Officer or Officer of Rank in charge, shall be kept securetly, and a list of such property properly indexed and filed for future reference. When such property is returned to such prisoner, he shall be required to sign a receipt for same. This shall not include property seized as evidence by members of the respective bureaus.

When a prisoner is brought to the station, the Superior Officer or officer of rank of the station at the time of arrest, shall immediately examine the prisoner, and if he finds any bruises, cuts or other injuries he shall forthwith make a written report thereof to the Chief of Police. If, in the judgment of the Superior Officer or officer of rank in charge, the prisoner is suffering from wounds or injuries which require medical attention, the arrested person shall be taken to a hospital and while in the hospital, such prisoner shall be in the legal custody of the police. If wounds or injuries appear to have been inflicted by the arresting officer, the official in charge shall report such fact to the Chief of Police. If it shall appear that unjustifiable violence was used, charges will be preferred against the offender. When a prisoner is unconscious from any cause, the Superior Officer or officer of rank in charge should immediately endeavor to restore consciousness. Failing to do so within a reasonable time, he should cause such person to be taken to a hospital for examination. An unconscious person should not be placed in a cell except with the sanction of a physician. If the Superior Officer or officer of rank finds that the prisoner is suffering from a mental condition, including but not limited to suicidal tendency he should provide proper safeguarding to prevent the prisoner from harming himself or other persons.

Whenever a person is taken into custody by any Police Officer and information is received that he has suicidal tenden-

cies, the arresting officers shall immediately advise the Booking Sergeant and the Superior Officer or officer of rank.

The Officer shall, with his arrest or protective custody report, indicate this information of suicidal tendencies when the report is filed.

The Booking Sergeant will indicate on his arrest sheet or protective custody report the information of suicidal tendencies. The Booking Sergeant and the Superior Officer or officer of rank shall assign a police officer outside of his cell to insure that no harm is self-inflicted on the person in custody.

The Superior Officer or officer of rank shall immediately contact the Emergency Services Network to determine if they can assume the responsibility of such person. In the event that such person is under arrest for a crime, the Clerk of Courts shall be called immediately so that a release can be obtained to the Emergency Services Network. If the hold is for a Protective Custody, a release will be made immediately as in keeping with the Protective Custody Laws.

The Commanding Officer shall, at all times, make sure that all precautions are taken so that the individual does not inflict harm on himself while in police custody.

SECTION 2. Prisoners shall be allowed to use the telephone, at their own expense, at the place wherein they are held in custody, whether they be under arrest for a felony or a misdemeanor, to communicate with family or friends, or to arrange for release on bail, or to engage the services of an attorney. They shall be informed forthwith upon the arrival at the station or other place of detention of this right, and such use shall be permitted within one hour thereafter.

A person held in custody at a police station or other place of detention, charged with operating a motor vehicle while under the influence of intoxicating liquor, has the right, at his request and at his expense, to be examined immediately by a physician selected by him. The police official in charge of such

station or place of detention shall inform him of such right immediately upon being booked, and shall afford him a reasonable opportunity to exercise it. A copy of General Law, Chapter 263, Section 5A shall be posted in a conspicuous place at the booking desk.

SECTION 3. When a woman is brought to the police station for detention, she shall immediately be placed in the care of the Matron on duty, and no person or officer shall be allowed to converse with her except by permission of a superior officer. When a woman or girl is brought to the police station for detention and no Matron is immediately available, she shall be kept under guard in a public room until taken in charge by a Matron.

Women and girls who are in the custody or under the care of the Department should not be searched by male police officers unless an immediate search under one of the following conditions appears to be necessary, and a police Matron, or other suitable woman is at the time and place available:

a. When there is good reason to believe that the person has in her possession a weapon, a poison, a drug or other like means of causing death or injury to herself or to others.

b. When there is a good reason to believe that stolen property is hidden about the prisoner and there is emminent danger that it may be thrown away or destroyed.

Searches in such emergency should be made with all possible regard for decency by direction and under the supervision of an officer of rank, should one be present, and with a witness other than the searching officer, if obtainable. After such a search has been made, the facts relating to it should be reported in writing by the officer to his commanding officer.

It is the duty of Police Officers to take possession of hat pins or other articles worn outside the clothing or carried in the hands and capable of being used as weapons, and to search bags, bundles, and other removable property.

When a woman is placed under arrest at a precinct station, she shall be brought to Police Headquarters as soon as possible. Female prisoners should not be transported in the same vehicle with male prisoners.

SECTION 4. Juvenile offenders should never be transported in a vehicle which is occupied at the same time by an older prisoner or prisoners, except in great emergencies, or when arrested in the company of an older person, or for complicity in the same offense, in which case a Police Officer shall accompany them within the vehicle.

SECTION 5. Members of the Department are strictly forbidden to carry on unnecessary conversation with prisoners, and the use of profane or abusive language or personal violence offered to any prisoner will be sufficient cause for dismissal from the Department.

SECTION 6. Members and employees of the Department are strictly forbidden at all times, either directly or indirectly, to furnish or suggest the name of a lawyer to any person, firm, or corporation who or which may be under arrest by, or in, any controversy with the Department, or involving litigation, or under any circumstances to send for or communicate with a lawyer or bondsman.

If any request for a lawyer or bondsman is made by a prisoner, the matter is to be referred immediately through the proper channels to the commanding officer, and the commanding officer shall exhibit or cause to be exhibited to the prisoner making the request, the section of the telephone directory containing the list of lawyers, and no suggestion shall be made as to the selection of a lawyer. The same procedure is to be followed in regard to a request for a bondsman. Any violation of this rule may be considered of sufficient seriousness to warrant dismissal from the Department.

SECTION 7. When a prisoner is booked for murder and placed in a cell, the superior officer or officer of rank in charge

of the uniform squad on duty, shall assign a police officer to guard said prisoner outside the cell during all the time the prisoner is in the cell. The cell door shall be locked. At no time is the officer guarding the prisoner to allow him to get out of his sight, and he is to remain on such duty until properly relieved by another officer.

RULE 27. DEPARTMENT PROPERTY

SECTION 1. An officer of rank or a superior officer shall be designated by the Chief of Police as officer in charge of Department property. It shall be the responsibility of this officer, under the direction of his Deputy Chief, to order, store and issue Department property, including uniforms and equipment, to members of the Department. He shall also be responsible for the proper keeping of records in connection with Department property.

SECTION 2. A member of the Department shall be responsible for the good care, proper maintenance and serviceable condition of the Department property issued for or assigned to his use. A member of the Department shall promptly report to his commanding officer the loss of, damage to, or unserviceable condition of any Department property issued for, or assigned to, his use.

SECTION 3. A member of the Department shall not alter police equipment by changing it in any way except in case of emergency.

SECTION 4. Department property shall be used for official purposes only in the capacity for which it was designed, and then only by the members of the Department to whose use such property is assigned, except as may be otherwise directed by the commanding officer or higher authority.

SECTION 5. All purchases of property required for the use of the Department, and all contracts for services to be rendered

or for repairs needed, and all outlay for any purpose shall be made by and under the direction of the Chief of Police with the assent of the Board of Police Commissioners, except as otherwise provided herein, or by the statutes of the Commonwealth or by the Ordinances of the City of Springfield.

PROPERTY DIVISION

SECTION 1. A Property Division is hereby established. Members of this unit will be assigned to the Detective Bureau and/or the Crime Prevention Bureau. Police Cadets will be assigned to this Unit when possible to assist.

SECTION 2. The Property Division will be responsible for all property recovered. This will include all bicycles, evidence and any property that we presently have on hand. The Records Division will provide the officer in charge of property with a monthly report of property returned and property presently on hand and the location.

SECTION 3. All Property, regardless of what it is, will have a property slip made out. Property received when members of this unit are not on duty will be placed in the Detective Bureau. It will be received and logged in by the officer assigned to the Detective Bureau on that date. All bikes will be properly tagged by the officer who asked City Yards to pick it up and left in the Chauffeur's Room for safe keeping until the property unit members are available. The booking sergeant will ensure that all bikes received are tagged with a property slip.

SECTION 4. Police Officers hold a position of public trust. It is therefore necessary that the handling of property be carefully accounted for to minimize the possibilities of adverse claims against the Department. This includes all lost, stolen or abandoned property, property taken from prisoners or from

mentally disturbed persons or those held in protective custody and all property held for evidence.

The following procedures will be in effect:

1. All property coming into the possession of Police Officers shall immediately be tagged with a property tag (SPD CR 84) for identification. The property tag should include the following information:
   a. Date and time of discovery
   b. Place of discovery
   c. Description of property
   d. Officers name
   e. Owners name (if known)
   f. Victims name
   g. Arrested persons name (if any)
2. All property will be logged into the property log maintained in the property room and in the Detective Bureau when members of the property unit are not available. No property and/or evidence will be held in any officers locker or desk.
3. Property seized as evidence shall be handled in accordance with the Departments policies and procedures on the "handling, preservation and security of evidence."
4. Under the direction of the Chief of Police, the officer responsible for the official custody of lost property shall give notice of the finding by . . . public places (M.G.L. C. 134, Sec. 1., M.G.L. C. 135, Sec. 7). Such places may be the police station and the Post Office.
5. All property properly marked shall be stored in an appropriate location designated by the Chief.
6. If property which is identifiable as to the owner is delivered to the station, the owner shall be notified by the officer in charge or the property officer, if any. An owner who appears to retrieve property, shall be required to:
   a. provide proper identification
   b. sign a receipt for the property

7. If property is not identifiable as to ownership and an individual subsequently appears and claims a right to the property, the property shall only be released upon that person establishing ownership rights to such property. Such person shall be required to:

a. provide proper identification

b. sign a receipt for the property

In the event that any property becomes the subject of controversy as to the rightful ownership, it shall not be delivered to any person except by written order of the Chief or by a Court order.

8. Disposition or sale of perishable or unclaimed property, and the proceeds thereof, shall be the subject to direction of the Chief in conformity with M.G.L. C. 135, Sec. 8, 9 and 10.

9. Whenever a stolen or misappropriated motor vehicle is recovered by a Police Officer, the officer in charge or records division shall notify the owner of record and the storage facility, if any, as soon as possible after the identity of the owner is determined. Notification shall be made in accordance with M.G.L. C. 266, Sec. 29A.

10. Property which has been forfeited for an offense may, if no other provision is made, be seized by a Police Officer and safely kept by the Department as provided by Department policy. Disposition of such evidence/property shall be subject to the direction of the Chief in conformity with M.G.L. C. 257.

11. The officer in charge, or property officer, if any or such other officer as designated by the Chief, shall periodically as required, submit to the Chief an inventory of all property coming into the possession of the Department.

12. All officers having custody over property coming into the possession of the police, shall be held strictly accountable for its safekeeping and security. This shall include property signed out of the property room for Court purposes.

13. A designated officer of the Detective Bureau will sign for and receive a key to the property room in the Detective Bureau. It will be his responsibility to log in and maintain all evidence/property received during the hours that the property unit members are not available.

RULE 28. FIREARMS

SECTION 1. A — Department members may carry only such firearms and ammunition as the Chief of Police or the Board of Police Commissioners shall determine. While on duty, Department members shall carry ONLY their ISSUED firearm loaded with Department ammunition only. Carrying of any other firearms, ammunition, other arms, or gas ammunitions is strictly forbidden unless authorized by the Chief of Police, in writing, or by a Department Order signed by the Chief of Police. Possession of any firearms, ammunition, or other arms, while on duty, except as evidence or as provided for in this paragraph, is prohibited. Commanding Officers shall be responsible for strict compliance of the terms of this paragraph by all members of their command.

B — The following are authorized firearms issued by .38 calibre revolver either a 4" or a 2" barrell better known as a Smith & Wesson Police Special and a Smith & Wesson Chiefs Special: 12 gauge and 16 gauge shotguns under various trade names; Thompson Sub-Machine Guns, .45 calibre; Reising Sub-Machine Guns, .45 calibre; 30-30 Winchester Carbines; Tear gas guns, trade names; Federal Co., Smith & Wesson, Penguin. Any other weapon that may from time to time be authorized by the Appointing Authority.

SECTION 2. A — A Department member who discharges his firearm for any reason except for target practice shall, prior to going off duty or as soon as practical, file with the on duty Commanding Officer a report containing the following information:

1. The names and addresses of victims and witnesses, if any;
2. The extent and treatment of injuries, if any;
3. The reasons and circumstances that required the use of his firearm.

B — Whenever a Department member discharges any Department weapon, except while practicing during training or at a supervised target practice, the Internal Investigating Unit of this Department shall conduct an investigation into the facts and circumstances surrounding the discharging of the firearms or other weapon and immediately shall submit a report of the results of their investigation through their Deputy Chief, to the Chief of Police, and to the Board of Police Commissioners.

SECTION 3. In the event of an injury or death caused by the discharge of a firearm, the on duty Commanding Officer shall:

a. In the event of an injury or death of a person caused by the discharge of a firearm the Commanding Officer in charge shall order a change in duty for the Police Officer involved from active street duty to inside duty until such time as the Internal Investigating Unit has completed their investigation and the Police Commission has made a finding; and

b. Take control of the firearm until the proper reports have been filed and a preliminary investigation has been completed.

c. The Chief may issue another firearm to the Officer involved only after a careful review of reports submitted to him under Rule 28, Section 2A and Section 4 concerning the incident.

SECTION 4. The Commanding Officer should file a complete report of any firearm discharge referred to in paragraphs 2 and 3 with the Chief of Police at or before the completion of the Tour of Duty.

SECTION 5. An Officer shall keep his firearm clean and in workable condition at all times.

a. If at any time the firearm proved defective or is in need of repair, it shall be turned into the proper authority for replacement.

b. Unused ammunition shall be replaced at least once a year.

SECTION 6. An Officer shall not alter or modify his firearm or ammunition in any way without the express permission of the Chief with the approval of the Board of Police Commissioners.

SECTION 7. Each Officer shall review proper shooting fundamentals and shall be required semi-annually to qualify in the use of firearms.

SECTION 8. When not in use, firearms shall be carried in their proper cases or holsters.

SECTION 9. All of the above also apply when an off-duty Officer uses his firearm for Police purposes.

SECTION 10. The service revolver should be unloaded and locked in a safe place when it is not under the direct control of the Officer.

SECTION 11. The intent of these rules is to regulate the use of all Police firearms and therefore these rules apply to all revolvers, pistols, shotguns, rifles, authorized off-duty firearms and other similar or related equipment.

SECTION 12. The procedures outlined in this section sets forth the circumstances under which a firearm can be used by department members. A department member shall not discharge a firearm in the performance of duty, except under the following circumstances, and then only after all other reasonable alternatives have been exhausted and where there is no substantial danger to the public.

1. To defend himself or another person from an attack which he has reasonable cause to believe could result in death or serious physical injury;

2. to effect an arrest, ONLY if —

(a) The arrest is for a felony

(b) the Officer reasonably believes that the force employed creates no substantial risk to innocent persons; and

(c) the Officer reasonably believes that

(1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

(d) the Officer should have either witnessed the crime or should have sufficient probable cause to reasonably believe that the subject committed a felony.

3. To kill a dangerous animal, or one that is so severly injured that humanity requires its removal from further suffering.

4. During authorized training or supervised target practice at ranges approved by the Department.

5. An alarm shot to prevent serious physical injury or death.

SECTION 13. Firearms shall NOT be discharged:

1. As a warning or signal shot;
2. To effect a misdemeanor arrest;
3. At or from a moving vehicle except when a life threatening situation exists or to apprehend a felon or one who has committed a felony involving the use of deadly force.

RULE 28A. CLUBS

SECTION 1. Police Officers may carry only such clubs as the Chief of Police or the Board of Police Commissioners shall determine and are issued by the Springfield Police Department.

SECTION 2. Concerning the use of clubs, in effecting an arrest a department member may use any force necessary that is reasonable and proper under the circumstances, to overcome any resistance offered. Whenever a member of this department finds it necessary to use his club in the performance of his duties and strikes a person with it, he shall immediately or as soon as possible thereafter inform his commanding officer. At the end of his tour of duty he shall submit a complete written report of the details concerning the use of his club to the Chief of Police through his Commanding Officer. The report shall include the name of the person upon whom the club was used, the names of other Officers present, witnesses and any other person concerned in the incident, the circumstances under which the club was used, the nature of the injury inflicted, if any, and the care given afterwards to the injured party.

RULE 28B. AEROSOL IRRITANT DEVICES

SECTION 1. TRAINING

a. All personnel will receive two (2) hours of training on the use of mace.

b. The training will be conducted in the Police Academy or at any other suitable location.

c. A department record shall be maintained as to the date and time of the training of each Officer.

SECTION 2. ISSUANCE OF MACE

a. The Supply Office will issue to each Officer assigned to the Uniform section a Mark IV canister with holster and Mark III Professional with holster to all plainclothes personnel.

b. The Supply Office will maintain a record file on the date and number of the unit issued to each Officer. The printout to the Supply personnel.

c. The Supply Officer will check and inspect the unit at the semi-annual uniform inspection as to numbers and condition of the unit and will file a report to the Chief of Police.

SECTION 3. CARRYING OF AEROSOL DEVICES

a. All personnel regardless of their assignment will carry the unit while on duty except when assigned to Office details.

b. The unit will not be carried while Off duty without written authorization from the Chief of Police.

c. Extra Police duty assigned personnel will be allowed to carry the unit.

SECTION 4. THE USE OF THE AEROSOL UNIT

a. The unit may be used in situation where the Officers' duties requires the use of physical force to protect himself or others from assault only.

b. The Officers may use the unit to restrain or subdue another person when other means are not available.

c. The unit is to be used only on a one to one person basis and not in a large group situation.

d. Random use of the unit will not be allowed.

e. When the device is used against another the individual should be arrested and charged with the crime that caused the initial use of the aerosol unit.

f. No arrest should be made if the person that the unit was used on had not committed a crime.

SECTION 5. REPORTING THE USE OF THE AEROSOL UNIT

a. The Officer using the aerosol unit shall submit a written report including the name, age and address of the person that the aerosol unit was used on and the circumstances as to why the unit was used. The report shall also contain the treatment given to the individual.

b. This report shall be submitted whether or not an arrest was made.

SECTION 6. TREATMENT FOR THE PERSON

a. The Commanding Officer on duty shall have the contaminated skin area flushed with a profuse amount of water and expose the area to fresh air.

b. The skin should not be rubbed or touched.

c. The effects of the agent should dissipate in 15 to 20 minutes.

d. After initial aid has been administered the prisoner or person unit used on, shall be taken to the emergency room of a hospital within the City for examination.

e. The time, doctor's name and diagnosis shall be entered on the report submitted by the Officer.

f. The Officer using the unit shall complete the aerosol irritant evaluation report SPD CB#200 and attach it to the special report forwarding to the Chief's Office whenever the unit is used.

SECTION 6. REPLACEMENT OF UNIT

a. A replacement will be issued when the unit is not functioning properly in the unit.

b. The Supply Officer shall record the reason and the new unit number on his master record file.

IRRITANT EVALUATION REPORT

Report Direct to: The Office of the Chief of Police

Officer Involved: _____
Rank Name Badge # Squad

Date of Incident: _____ Indoor_____ Outdoor_____
Time Location Date

Type of Assignment: ____M/V;M/C ____Foot ____Plainclothes ____Other

Lighting Conditions: ____Daylight ____Night Lighted ____Indoors ____Other

Weather Conditions: ___Clear ___Cloudy ___Rain ___Snow ___Fog ___Other

Device Used: _____Mark III _____Mark IV

_____

in civilian clothes, describe where device was carried.

_____

Was there any difficulty extracting the device for use? _____Yes _____No Explain

_____

Approximate distance in ft. between you and subject when device was used?

_____

Was there any difficulty in aiming the device? _____Yes _____No. Explain

_____

Did the subject react to the device as explained in the training program?
_____Yes_____Explain

_____

Was there any difficulty in transporting the subject due to lingering effect of the device?
_____Yes_____No Explain

Name and address of person unit used on:

Arrested: _____Yes _____No If yes, what charges:

_____

Signature: _____

USE SPACE BELOW FOR ADDITIONAL DETAILS:

RULE 29

CONDUCT OF MEMBERS

For The Purposes of This Section
The Following Definitions Will Apply

DEFINITIONS: For the purpose of this rule, the following definitions will apply:
EMPLOYEE shall mean all members of the Springfield Police Department, both sworn Officers and civilian personnel.
FORCE refers to the sworn members of the Department who are vested with full Police powers.
OFFICER means a sworn Department member clothed with full Police powers.
GENERAL CONSIDERATIONS: Police Officers are more visible to the community than most other persons in government or public service. Public scrutiny, and sometimes public criticism, is directed not only at Police performance but also at the behavior of those who deliver Police services.
The establishment of proper standards for Police behavior must take into account not only the expectations of the citizen but also the importance of respecting the individual rights of Police employees. The Springfield Police Department recognizes that its employees have certain basic personal rights and restricts those rights only where necessary to insure the integrity of the Department and the highest quality of Police service is maintained.
CONDUCT: Employees shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming an employee shall include that which tends to indicate that the employee is unable or unfit to continue as a member of the Department, or tends to impair the operation of the Department or its employees.

DIRECTIVES AND ORDERS: Employees shall obey and comply with all rules, orders and other directives of the Department whether transmitted verbally or in writing. Employees shall obey all orders of a Superior Officer, Officer of Rank or Supervisor.
IMPROPER ORDERS: An employee, given an order which he believes to be improper or not in accordance with Department rules, must obey the order. He may then appeal the matter to his Commanding Officer, and if the matter is not resolved at that level, it may be appealed through the chain of command to the Police Commission.

Conflicting Orders: An employee given an order which conflicts with Department rules and/or policies or with a previous order from a higher authority, shall promptly and respectfully call the conflict to the attention of the Superior Officer, or Officer of Rank or Supervisor giving the order. If the Superior Officer, Officer of rank or Supervisor does not withdraw or change his order to avoid the conflict, the order shall be binding upon the employee unless or until it is specifically countermanded by an Officer or Supervisor of higher rank.
RESPECTFUL TREATMENT: Employees shall, on all occasions, be civil and respectful, courteous and considerate toward their supervisors, their subordinates, and all other members of the Department and the general public. No employee shall use epithets or terms that tend to denigrate a particular race or ethnic group except when necessary in police reports or testimony.
REPORTING FOR DUTY: Employees shall report for duty at the time and place specified by their Superior Officer, Officer of Rank or Supervisor and shall be physically and mentally fit to perform their duty. They shall be properly equipped and cognizant of the information required for the proper performance of duty so that they may immediately assume their duties.

They shall acquaint themselves with all matters occurring since their last tour of duty which affect their responsibilities and be accountable for compliance with all new orders, rules, bulletins and circulars.

SLEEPING ON DUTY: Employees shall remain awake and alert while on duty.

MAINTAINING DEPARTMENT RULES AND REGULATIONS: Employees of the Department shall sign a receipt at the supply room for a copy of this and all other subsequent Rules and Regulations of the Department as they are promulgated. Copies of the receipts shall also be filed in the Office of the Chief of Police. Employees shall maintain their copies of the Rules and Regulations of the Department in the binder provided and shall be prepared to produce their binder for the examination or inspection by any Superior Officer of Rank or supervisor upon reasonable notification. In addition, employees shall be responsible for knowledge of, and full compliance with all Rules and Regulations of the Department that apply to their duties.

ACCOUNTABILITY: Superior Officers, Officer of Rank and Supervisors shall be held accountable for the action of all subordinates subject to their authority and under their command.

RESIDENCE AND TELEPHONES: Except as otherwise provided by law or collective bargaining contracts all Officers and employees of the Department shall live in the City of Springfield. All employees of the Department shall report their place of residence and their telephone number to the Office of the Chief of Police. They shall also report to the Chief of Police any change of residence or telephone number within twenty-four hours after such change.

NEGLECT OF DUTY: This includes any conduct or omission which is not in accordance with established and ordinary duties or procedures as to such employees of which constitutes use

of unreasonable judgment in the exercising of any discretion granted to an employee.

RULE 29. CONDUCT OF MEMBERS

SECTION 1. All members of the Department shall obey the Rules and Regulations as set forth herein, the Ordinances of the City of Springfield, the laws of the Commonwealth of Massachusetts and of the United States of America, and shall perform their duties with silent courage, discretion, placing the safety and welfare of the City of Springfield and its citizens first at all times.

SECTION 2. Coolness and firmness are expected of every member of the Department. In time of peril, emergency, or danger, members of the Department shall assist each other and act together as far as possible. Any cowardice or shirking of duty in the face of danger or emergency shall be cause of disciplinary action which may include dismissal.

Every member of the Department shall be quiet, civil, and orderly in the performance of his duty; shall be attentive and zealous exercising patience and forbearance and at all times, even under provocation; and shall refrain from harsh, violent, coarse or profane language.

SECTION 3. All members of the Springfield Police Department shall report to the Chief of Police their place of residence and telephone number with such particularity as to enable them to be easily found, and shall report any change of residence or telephone number within twenty-four hours after such change occurs. The address furnished to the Chief of Police shall be the ACTUAL PERMANENT DOMICILE of such member. Any violation of this section will be a serious violation of Department Rules and Regulations. All Department members are required to maintain a telephone number at which they can be reached.

SECTION 4. Members of the Department shall hold themselves in readiness at all times to answer the call and obey the orders of their Superior Officers. Eight hours shall constitute the regular tour of duty, but all members of the Department shall be deemed to be always on duty, and shall have the same responsibility in the suppression of disturbances and the arrest of offenders when not in uniform as when in uniform. Members of the Department are expressly prohibited from engaging in any private detective or extra police work, except special Police duty or service with the consent of the Chief of Police. Application for such Police duty shall be made to the Chief of Police or the Superior Officer designated by the Chief to be in charge of extra paid police details.

No member of the Department, during his off-duty hours, shall work in an establishment in which alcoholic beverages are offered for sale, except when assigned to such establishment on an off-duty assignment through the Department. Subject to the foregoing prohibition, any member of the Department during his off-duty hours may enter the employ of any person, firm, or corporation or engage in any gainful occupation for a period not exceeding twenty-four hours in each calender week, exclusive of vacation weeks provided he reports the existence of said employment, the location of the same, and the hours of the same to the Chief of Police prior to engaging in the same. Such employment shall not excuse a member of the Department from attending to his duties in the Department, and shall not be considered by the Chief of Police in assigning members to tours of duty.

SECTION 5. No member of the Department shall receive from any person, firm or corporation, any compensation, reward, gift or present for any service rendered except upon permission of the Board of Police Commissioners. No member shall, directly or indirectly, accept from any person liable to arrest or complaint, or in custody, or after his discharge there-

from, or from any friend or friends of such person any gratuity, gift or reward whatsoever, or be concerned directly or indirectly in any compromise, arrangement or settlement between criminals and persons who have suffered by their acts.

GIFTS AND GRATITUDES: Employees of this Department shall not solicit, seek or accept any gift of gratuity including food and drink, for themselves or others, from an individual, merchant or business establishment, when it can be construed to involve their position as an employee of the Springfield Police Department.

Employees shall immediately report to their commanding officer, in writing, any offer or attempt to offer any gift or gratuity when it can be construed to involve their position as an employee of the Springfield Police Department.

SECTION 6. Charitable Solicitations: Employees, while on duty or in uniform, shall not solicit from the general public, money, gifts, or other things of value for charitable or testimonial purposes nor otherwise use their identity as Police Officers for such purposes.

SECTION 7. No member or employee of the Department shall communicate to any person not connected with the Department any information concerning Police business, nor shall they communicate to any other Officer any special orders they may have received, nor shall they communicate to anyone where or in what work any Officer may be engaged, except by permission of the Chief of Police or the official in charge of the station. No member or employee shall communicate to any person information which may enable them to dispose of or secrete any valuable things stolen or otherwise unlawfully obtained or held.

SECTION 8. No member of the Police Department shall take part in politics for or against any candidate or party at anytime or place, whether in uniform or not, except to vote at primaries or elections. They shall not solicit, or make any

contribution in money or otherwise, for political purposes. No rule, regulation or provision of law shall prohibit a member of the Police Department who is not on active duty from distributing material at a polling place in an election where there appears on the ballot a referendum pertaining to or affecting the conditions of employment, including hours of labor and compensation in the Department of which such member is an employee.

SECTION 9. Members of the Department shall not conduct themselves in an immoral, indecent, lewd, or disorderly manner, or in a manner that might be construed as immoral, indecent, lewd or disorderly. They shall not be guilty of misconduct, neglect of duty, conduct unbecoming an Officer and a gentlemen, or acts tending to discredit the Department, even though such conduct is not specifically set forth in these Rules and Regulations.

Members shall not bring intoxicating beverages into any Police building or vehicle, except liquor that has been seized as evidence or contraband, or that has been found unsecured, or that is the property of a prisoner. Members shall not drink any alcoholic beverages while on duty. Officers in plainclothes, with the consent of the Superior Officers, may drink alcoholic beverages while on duty when necessary to accomplish a Police purpose. No Officer off duty in uniform or in any part of uniform dress shall drink any alcoholic beverage in public view or in a place accessible to the public. No member while off duty shall drink an alcoholic beverage to an extent which renders him unfit to report for duty, or which results in the commission of an obnoxious or offensive act which might tend to discredit the Department. The odor of liquor on the breath of a member while on duty will be cause for suspension.

Members of this Department while on duty shall not enter or visit any bar, cocktail lounge, beer parlor, night club, or other place where beer or liquor is sold, or any alleged house of ill fame, gambling house, or other disreputable house except for the time necessary to complete official business.

USE OF ALCOHOL AND TOBACCO ON DUTY: Employees shall not drink alcoholic beverages while on duty unless it is necessary to gain evidence and upon the order of a Superior Officer or Officer of Rank. Employees shall not appear for duty or be on duty while under the influence of alcoholic beverages to any degree whatever or have an odor of alcohol on their breath.

Employees shall not smoke or chew tobacco while in uniform, when on view of the public, or when in contact with the public. (This is not meant to prohibit smoking in a marked or unmarked car).

No employee shall smoke or chew tobacco when in direct contact with the public, (while taking a report, conducting an interview, or making an investigation, on private property), in uniform or plainclothes.

USE OF ALCOHOL OFF DUTY: Officers while off duty shall refrain from consuming alcoholic beverages to the extent that it results in obnoxious or offensive behavior which would tend to discredit them or the Department or render them unfit to report for their next regular tour of duty.

ALCOHOLIC BEVERAGES IN POLICE INSTALLATION: Employees shall not bring into or store alcoholic beverages in any police facility or vehicle except alcoholic beverages which are to be held as evidence or found property which is held for safekeeping.

USE OF DRUGS: Employees shall not use any prescription drugs, controlled substances, narcotics or hallucinogens except when prescribed for treatment of the employee by a registered physician or dentist. When prescription drugs, controlled substances, narcotics or hallucinogens are prescribed for him, an employee shall notify his Superior Officer or Supervisor, in writing, before his next tour of duty of such prescription. Prescription drug, controlled substance, narcotic or hallucinogenic shall mean any substance so defined in Massachusetts General Laws, Chapter 94C.

A Superior Officer, Officer of Rank or Supervisor shall, when notified by an employee that any prescription drugs, controlled substances, narcotics or hallucinogens have been prescribed and ingested, notify the City Physician of the quantity of the substance which the employee reports have been prescribed and shall be guided by the City physician's opinion as to whether or not the employee can fulfill his duties while under the influence of such prescribed substance. In the event that the City physician cannot be reached, the Superior Officer of Rank or Supervisor shall exercise his own best judgment as to whether or not the employee, reporting the use of such substance, should perform his Departmental duties.

Whether or not the employee does continue to perform his Department duties shall not affect the responsibility of the Superior Officer, Officer of Rank or Supervisor to notify the City physician of the use of such substance as soon as possible. A special report of any action taken under this section shall be submitted by the Superior Officer, Officer of Rank or Supervisor to the Chief of Police.

POLICE SERVICE: Employees, while on duty, shall promptly respond to all persons requesting service, insofar as it is within their duties and is consistent with Department rules and policies.

PERSONAL BUSINESS: Employees of the Department shall not engage in personal business while on duty and shall avoid all activities not relating directly to their Departmental responsibilities.

SECTION 10. No member of the Department shall be permitted to apply for a warrant for an assault upon himself without first reporting the case through his Commanding Officer to the Chief of Police and obtaining permission to make such application. No Officer shall apply for a warrant of arrest or for a search warrant except with the approval of his Commanding Officer.

SECTION 11. When passing or addressing his Superior Officers or Officers of Rank, every member shall salute them, whether in uniform or not, by rendering the standard military right-hand salute. It is the duty of the subordinate to salute first and the Superior to return it. Officers must salute Superiors at all times when they meet them. Men in ranks must not salute unless ordered by the Officer in Command. Upon entering the Office of the Mayor, Board of Police Commissioners, Chief, or Deputy Chiefs, members of the Department must remove their hats or caps and stand at attention until otherwise ordered.

SECTION 12. All members of the Department shall salute the official National Colors as they pass in public parades, ceremonies, or other occasions, or when carried into any building, room, or place where they are present, unless their urgent duties at the time make such action inadvisable. Whenever the National Anthem is played at any place where any members of the Department are present, they shall stand at attention, facing toward the flag. If in uniform, they shall salute at the first note, retaining the position of salute until the last note of the Anthem, unless their urgent duties at the time make such action inadvisable. If not in uniform and covered, they shall uncover at the first note, holding the headdress over the heart, and so remain until it's close, except that in inclement weather, the headdress may be slightly raised.

SECTION 13. Details of members of the Department to perform Police Service beyond the limits of the City of Springfield, on application of City or town authorities, shall not be made except as authorized by the Chief of Police, Deputy Chief of Police or Senior Officer on duty in cases of emergency.

SECTION 14. Whenever any member of the Department retires, resigns, or is discharged, he shall surrender all his Police equipment to the Chief of Police.

SECTION 15. Any member of the Department desiring leave of absence must obtain the same from the Chief of Police by applying in person; any member of the Department reporting sick must do so in person, if possible, to his Commanding Officer, or to the Commading Officer on duty at the time of his sickness.

SECTION 16. No member of the Department shall be allowed to carry a key to any private dwelling except his own or to any place of business without permission from the Chief of Police.

SECTION 17. Members of the Department, while riding on any public conveyance in this City and in uniform, are forbidden to occupy a seat in such conveyance while any other person is obliged to stand because of lack of seats.

SECTION 18. No member or employee of the Police Department shall ride without paying full fair in any vehicle operated or controlled by any person, firm, or corporation licensed to operate taxicabs upon the public ways of the City of Springfield, except in the performance of duty, or in case of accident or other emergency when the commandeering of motor vehicles is permitted. In all such cases, the member or employee so riding shall make a special report in writing to the Chief of Police setting forth the circumstances and his reason therefore.

SECTION 19. No Police Officer shall use his automobile in going to or from his post except by permission of his Commanding Officer. No member of the Department shall use his own private automobile in the performance of Police duty without the permission of the Chief of Police. Members assigned to plainclothes duty may use their own private automobiles in the performance of police duty with permission of their Commanding Officers.

SECTION 20. No member of the Department shall secure or attempt to secure a legal opinion from the Law Department

of the City of Springfield without first securing permission from the Chief of Police.

SECTION 21. Members of the Department shall not shop, barter, or trade while on duty, nor devote any of their on-duty time to any activity other than Police work.

SECTION 22. Members of the Department when in uniform shall not carry an umbrella or cumbersome bundles, nor shall they walk or stand with hands in pockets. While in uniform a Police Officer shall not wear earrings or ear studs; nose studs; or any type of necklace, chains or medalions outside of a uniform shirt, blouse or jacket.

SECTION 23. HAIR. Hair will be neat, clean, trimmed, and present a groomed appearance. Hair will not cover or overhang the ears, or touch the shirt collar when the Officer is standing at attention and wearing his official headgear. A tapered appearance is preferred; however, a block cut is acceptable. When a block cut is worn, the hair at the collar line will not curl outwards. Hair in front will be groomed below the band of properly worn headgear. In no case will the bulk of length of the hair interfere with the proper wearing of any Police headgear.

The acceptability of a Police Officer's hair style will be based upon the criteria in this paragraph and not upon the style in which he chooses to wear his hair.

SIDEBURNS. If an individual chooses to wear sideburns, they will be neatly trimmed. They will not prevent the ears from being visible to someone who is observing full face from a distance of not less than two feet. Sideburns will not extend below the lowest part of the ear lobe, will be of even width (not flared), and will end with a clean-shaven horizontal line.

MUSTACHES. A full or trimmed mustache is permitted. It will not extend downward beyond the line separating the skin and vermilion part of the lip. The mustache will not extend sideways beyond a vertical line drawn upward from the corner of the vermilion border of the lips.

BEARDS AND GOATEES. The face will be clean-shaven other than for an acceptable mustache or sideburns. Beards and goatees are prohibited except that a beard is permitted when a medical doctor prescribes that a patient not shave for medical reasons., In such instances, the beard will be kept trimmed symmetrically, and all beard hairs will be kept trimmed so that they do not protrude more than one half of an inch from the skin surface of the face. Beards may be worn for tactical reasons when so authorized by the Chief of Police.

WIGS. Wigs or hair pieces will not be worn while on duty or in uniform, except for cosmetic reasons to cover natural baldness or physical disfiguration. Under these conditions, the wig style will conform to the standards for hair and sideburns.

SECTION 24. Members of the Department shall pay all just debts and meet all other obligations undertaken by them.

SECTION 25. Members of the Department who receive written communications regarding Police business directly from citizens, officials, or other law enforcement agencies, shall not take personal action or make personal answer, but shall forward such communications to the Office of the Chief of Police to be processed and answered through official channels. All official correspondence, telegrams, circulars, and other communications shall be sent over the signature or upon the authority of the Chief of Police. Members shall not use Police Department letterheads except for authorized Departmental correspondence.

SECTION 26. Members of the Department shall obtain written permission from the Chief of Police to attend conventions or to fill speaking engagements, or to publish articles as official representatives of the Police Department. No member shall act as a correspondent to a newspaper or periodical, nor shall he discuss publicly or for publication, matters pertaining to police personnel, procedures or policies which may tend to interfere with proper police discipline or morale. No statements

shall be made which breach any confidential matter or question the loyalty and integrity of any other Police Officer or Supervisor.

SECTION 27. No member of the Department shall permit a prisoner confined to Police Headquarters or to a precinct station to be interviewed or photographed by any representative of a newspaper, television station, radio station, or any other news media.

SECTION 28. All members of this Department attending Court as a witness shall appear in full and proper uniform, properly buttoned, or in proper civilian attire consistent with the dignity, and decorum of the court. No such member shall, while in court, engage in any idle conversation or other action which might disturb the court proceedings, nor shall they chew gum or read newspapers or other materials not directly concerned with the court proceedings.

SECTION 29. No member of the Departmment may transport persons or prisoners committed by the court to prisons, hospitals, or institutions outside of the City of Springfield, or any person or persons privately committed to hospitals or institutions outside of the City of Springfield without permission of the Chief of Police.

SECTION 30. All members of the Department, regardless of assignment or rank, are expected to enforce and take proper action in regard to all laws of the Commonwealth and Ordinances of the City at all times.

SECTION 31. No member of the Department shall release to any news media any information or make any statements in connection with the Department, or any of its functions or activities, except that all such information shall be released to the news media only by the Board of Police Commissioners or by the Chief, and in his absence, by the Deputy Chief, who under these Rules assumes his duties. Notwithstanding the foregoing, Commanding Officers and Officers in charge of re-

spective bureaus or squads may furnish, without the express permission of the Chief of Police, to news media information concerning routine ambulance, Detective Bureau, Crime Prevention Bureau, Youth Aid Bureau, Traffic Bureau, and precinct station reports, complaints, accident reports, and arrests.

SECTION 32. DEPARTMENTAL REPORTS—TRUTHFULNESS: Employees shall submit all necessary reports on time and in accordance with established Departmental procedures. Reports submitted by employees shall be truthful and complete. No employee shall knowingly enter, or cause to be entered, any inaccurate, false or improper information.

SECTION 33. CONFLICT OF INTEREST: Employees shall comply with the provisions of General law, Chapter 268A and St. 1909, Chapter 486, Section 8, the conflict of interest statutes.

SECTION 34. ABUSE OF PROCESS—WITHHOLDING EVIDENCE: Officers shall not intentionally manufacture, tamper with, falsify, destroy, or withhold evidence or information nor make false accusations of a criminal charge or seek to influence the outcome of any investigation.

SECTION 35. RECOMMENDATIONS OF SERVICE: Employees shall not recommend or suggest in any manner except in the transaction of personal business, the employment or procurement of a particular product, professional service, or a commercial service, including but not limited to, the services of an attorney, bondsman, bail commissioner or funeral director, an ambulance service or a towing service. In case of towing service, when such service is necessary and the person needing the service is unable or unwilling to procure it, the Officer shall proceed in accordance with established Department procedure.

SECTION 36. ENDORSEMENT AND COMMERCIAL PRODUCTS: The Department does not endorse commercial products or allow its facilities to be used for such endorsements.

Department personnel shall not make any endorsements of commercial products in their capacity as members of the Department.

SECTION 37. SITUATIONS INVOLVING FAMILY MEMBERS OR FRIENDS: An Officer confronted with situations requiring Police intervention, in which a member of his family, a neighbor, or a friend is involved shall not intervene unless an emergency exists, and then only to meet the emergency. The Officer concerned shall notify the proper Police authority in the city where the incident has occurred, so that a more objective police unit may handle the matter.

SECTION 38. SITUATIONS INVOLVING OFF-DUTY SPRINGFIELD POLICE OFFICERS: When an on duty Officer is confronted with a situation in which the conduct of a Springfield Police Officer is in question, that Officer shall follow appropriate and normal Police procedures and as soon as possible, shall notify the Commanding Officer on duty and request that a Superior Officer, or Officer of Rank respond.

SECTION 39. ASSOCIATION WITH CRIMINALS: Department employees shall not associate with persons who they know, or should know, are persons under criminal investigation, or who have a reputation in the community or in the Department for recent or present involvement in felonious or criminal activities. This rule shall not apply where said associations are necessary in the performance of official duties, or where said associations are unavoidable due to familiar relationship of employees.

SECTION 40. SELF-IDENTIFICATION: General Law, Chapter 41, Section 98D, requires every Officer to carry his identification card with photograph and exhibit this card upon a lawful request for purposes of identification. Any Officer, acting in his official capacity, shall give his name, rank and badge number, in a civil manner to any person who may inquire unless he is engaged in an undercover Police operation and his

physical safety or the Police operation would be jeopardized by his making such identification. Civilian employees, while engaged in their Departmental duties shall identify themselves in a civil manner to any person who may inquire as to their identity and status within the Department.

SECTION 41. No person who appears before the Board of Police Commissioners shall bring into the meeting room any weapons but he shall deposit the same with the Commanding Officer on duty at the time of the appearance.

SECTION 42. Whenever any matter comes to the attention of any member of the Department which indicates that another member of the Department may have been involved in the violation of any law, the Rules and Regulations of this Department, or the written orders issued by the Chief of Police, the member to whose attention such matter comes shall immediately report it in writing before the end of his tour of duty (or if the information is received while he is off duty, during his next tour of duty) to his Superior Officer, who shall forthwith transmit it with his written endorsement through the chain of command to the Chief of Police. Upon receipt of such a report by the Chief of Police, he shall immediately notify the Board of Police Commissioners of the existence of the report, and he shall refer it for investigation. When the investigation has been completed, a report of the same shall be presented to said Board by the Chief at their next meeting. This section shall not diminish the authority of the Chief or of said Board to take such disciplinary or other action as either deems appropriate at any stage of the matter.

RULE 30. UNIFORMS

SECTION 1. Members of this Department shall wear such uniforms and insignia of rank as the Board of Police Commissioners may, from time to time, prescribe and all uniforms,

insignia of rank, and equipment furnished to members of the Department shall remain the property of the Police Department.

SECTION 2. Whenever the open collar summer shirt is worn and an undershirt is worn which is exposed between the highest button and the neckline, the color of undershirts shall be white.

SECTION 3. If a member's uniform is damaged or destroyed by his own negligence or from being worn when he was not on duty, he will be obliged to replace the same at his own expense. If an Officer fails to take reasonable care of his uniform and equipment, it will be held to be a violation of the Rules and Regulations of the Department.

SECTION 4. When demand has been made upon a member of the Department by a duly authorized Officer, such member shall return any part of the uniform or equipment, property of the Department which has been issued to him, in as good condition as when issued, reasonable wear and depreciation from use expected.

SECTION 5. The prescribed Police uniform shall be worn by all members of the Department (except Officers assigned or detailed to duties in plain clothes), when on duty before the public. Rubber coats, etc. of an approved pattern shall be worn when needed.

SECTION 6. Members of the Department shall, at all times, carry their badge and identification card, and when in uniform, shall display their badge on their outermost garment over their left breast, and similarly, if at any other time it is necessary for them to establish their official identity. They shall not wear, use, display, or have in their possession a Police badge other than the one issued to them as authorized by the Board of Police Commissioners.

SECTION 7. While off-duty members of the Department are restricted in the use of their uniforms: (a) they may wear their full uniform in going to and from work, (b) when wearing

civilian headgear, they shall not wear their uniform shirts and blouses unless the latter are under a civilian coat, (c) when bareheaded, Officers shall not wear their blouses and badge or shirts and badges unless the latter are under a civilian coat, (d) no civilian attire shall be worn with the uniform cap.

SECTION 8. Members shall be required to submit to inspections of clothing by Commanding Officers at such times as maybe ordered, and Commanding Officers shall submit to the Superior Officer or Officer of Rank in charge of the Department property, a list of uniforms which, in his opinion, should be replaced. The Superior Officer or Officer of Rank in charge of Department property shall make arrangements for the replacement of such uniforms in connection with the preceding sentence as budgetary allowance may permit. All uniforms issued to members of the Department shall remain the property of the Police Department.

RULE 31. PAY

SECTION 1. Work Week

a. Except as otherwise provided in any collective bargaining contract, the services of all Police Officers shall be restricted to five days in any one week, provided that when the Chief of Police determines that public necessity so requires, services in excess of the days aforesaid maybe authorized

SECTION 2. Sick Pay

a. Absences from duty due to injury, disability, or illness shall be reported to the Chief of Police forthwith. The report shall state the nature of the injury, disability, or illness.

b. Absences of more than two work days will not be approved for sick pay unless a doctor's certificate is submitted with the petition.

c. Absences of one to three work days inclusive, not supported by a doctor's certificate, unless due to being injured on

duty, will not be approved if the petitioner has been absent on sick pay for other than being injured on duty for more than four work days during the preceding twelve months, and which were not supported by a doctor's certificate.

d. At the discretion of the Chief of Police, a Superior Officer or Officer of Rank will be directed to visit the member who is absent for reasons other than being injured on duty. The Superior Officer or Officer of Rank will submit a special report to the Chief of Police upon his return from the visit.

e. After a member of the Department has been absent due to injury, disability, or illness and who is not hospitalized, he or she may be directed to be examined by the City Physician or Assistant City Physician, who will be requested to report his diagnosis to the Board of Police Commissioners.

f. After a member of the Department has been absent due to injury, disability, or illness for more than twelve consecutive calendar weeks, he may be directed to be examined by the City Physician or Assistant City Physician, who will be requested to report the results of his diagnosis to the Board of Police Commissioners.

g. When it has been determined from medical reports that a member of the Department will no longer be physically capable of performing the duties of a Police Officer, consideration will be given to making a recommendation to the member that he initiate a petition for retirement.

(1) When it has been determined from medical reports that the member is incapacitated from performing the duties of a Police Officer, and that he may be so incapacitated indefinitely, the Commission may grant a leave of absence in accordance with applicable law.

h. The petitions for sick pay will be approved or disapproved by the Chief of Police prior to their submission to the Board of Police Commissioners for final approval or disapproval.

i. Submission of petitions for sick pay to the Board of Police Commissioners will be accomplished as follows.

(1) A tabulation of all petitions approved by the Chief of Police, and being submitted to the Board of Police Commissioners, will be compiled to indicate for each petitioner the number of days of sick pay resulting from being injured on duty and for other reasons previously approved during the current and prior years, the number of days included in the current petition, and a brief description of the injury, disability, or illness.

(2) A listing of all members who are petitioning for sick pay who have been absent on sick pay for more than thirty consecutive calendar days will be compiled and submitted to the Board of Police Commissioners, along with the tabulation described in the previous paragraph. This listing will group those who are absent because of having been injured on duty separate from those absent for other reasons. The number of consecutive weeks of absence will be shown for each member listed; the date the member was last examined by the City Physician will be shown; and a description of the Board of Police Commissioners last action or recommendation with respect to each listed petitioner will also be indicated.

(3) A listing of members whose petitions for sick pay were disapproved by the Chief of Police will also be submitted. A brief description of the reason for disapproval will be shown for each petition.

(4) The petitions will accompany each of the pertinent tabulations or listings for review by the members of the Board of Police Commissioners if they so desire.

j. The Board of Police Commissioners will vote on the approval of the petitions included on the tabulation described in Clause "i" (1), after deleting any which may have been discussed individually and disapproved.

(1) The listing described in Clause "i" (2) will be reviewed and any petition requiring further action or recommendation by the Board of Police Commissioners will be discussed and voted upon individually by the Board of Police Commissioners.

k. The Chief of Police will cause to be maintained a statistical monthly report of the average hours of absence due to "injured on duty" per assigned member, and the average hours of absence due to "other causes" per assigned member. Separate averages will be maintained for each major organization segment of the Department.

l. Members of the Department must make written petitions for payment of wages for periods of absence due to illness, injury, or disability. A certificate from a physician shall be required to be submitted to the Chief of Police from all members absent from duty due to illness, injury or disability for three or more consecutive work days. The following forms are adopted for use of the Department as physicians's certificates:

CITY OF SPRINGFIELD MASSACHUSETTS
POLICE DEPARTMENT

PHYSICIAN'S FIRST CERTIFICATE

1. NAME OF PATIENT _____

2. RESIDENCE _____
(Street address, City and State)

3. DATE OF FIRST EXAMINATION _____
(Please make report under proper heading
SICKNESS OR INJURY)

SICKNESS

4. WHEN TAKEN SICK _____

5. PREVIOUS CONDITION _____

6. DIAGNOSIS _____

INJURY

7. DATE OF INJURY _____

8. NATURE OF INJURY _____
(Please state exact location and extent of injury)

9. CAUSE OF INJURY _____

SICKNESS OR INJURY

Note: Please reply to the following in case of either sickness or injury:

10. COMPLICATIONS _____

11. IS THERE ANY EVIDENCE OR DO YOU KNOW OF ANY CAUSE OF MEMBER'S PRESENT CONDITION OTHER THAN AS DESCRIBED ABOVE?

12. PROGNOSIS _____

13. IS MEMBER ABLE TO RETURN TO WORK? _____

14. IF NOT ON WHAT DATE WILL MEMBER PROBABLY BE ABLE TO RETURN TO WORK? _____

15. REMARKS _____
(Please advise regarding treatment, including operations recommended, or performed, and other matters of interest)

I am willing to swear to the authenticity of this certificate if the Board of Police Commissioners so desires.

_____M.D.

DATE _____

ADDRESS _____
Street address, City or town and State)

To be signed by attending physician.

Physician's name to be printed under his signature

PHYSICIAN'S SUPPLEMENTAL CERTIFICATE

1. NAME OF PATIENT _____

2. RESIDENCE _____
(Street, City and State)

3. DATE OF MOST RECENT EXAMINATION _____

4. DIAGNOSIS _____

5. COMPLICATION _____

6. RECENT CHANGE IN CONDITION _____

7. PROGNOSIS _____

8. IS MEMBER ABLE TO RETURN TO WORK? _____

9. IF NOT, ON WHAT DATE WILL MEMBER PROBABLY BE ABLE TO RETURN? _____

10. WILL MEMBER REQUIRE FURTHER TREATMENT?

_____

11. IS THERE ANY EVIDENCE OR DO YOU KNOW OF ANY CAUSE OF MEMBER'S PRESENT CONDITION OTHER THAN DESCRIBED ABOVE OR ON YOUR PREVIOUS CERTIFICATES IN THIS CASE?

_____

12. REMARKS OR SUGGESTIONS _____

(Please advise regarding treatment including operations recommended or performed and other matters of interest)

I am willing to swear to the authenticity of this certificate if the Board of Police Commissioners so desires.

_____M.D.

Print name of Physician below signature

DATE _____

ADDRESS _____

Street, City or town, and State

(THIS INFORMATION IS NECESSARY TO SHOW CONTINUED DISABILITY FOR WORK)

The Physician's Supplemental Certificate shall be required to be submitted to the Chief of Police every seven days after the Physician's First Certificate is submitted, as long as member of the Department is absent from duty due to illness, injury or disability.

m. Any member of the Department injured in the line of duty under circumstances which ground a claim for liability against any person, firm or corporation and who received reimbursement or compensation therefrom for medical or hospital expenses incurred as a result of such injury, shall be required to pay his medical or hospital expenses, or in the event the City of Springfield has paid such medical or hospital expenses, he shall repay the City of Springfield. Such repayment shall be made to the City of Springfield within five days of the day upon which money derived from the settlement or trial of the claim arising out of said injury shall be received by such member. Every member of the Department injured in the line of duty shall report to the Chief of Police, in writing the name of any person, firm or corporation against whom he has pending any claim, and of the insurance company, if any, covering the liability of such person. Violations of this rule will be treated as serious offenses.

SECTION 3. BEREAVEMENT LEAVE

a. A municipal employee shall be granted bereavement leave under the following conditions:

(1) He shall submit proof of relationship and death satisfactory to the Chief of Police, whereupon he shall be granted bereavement leave with full pay not to exceed three regularly scheduled consecutive working days, such leave not to extend more than one day beyond the date of the funeral of the deceased relative.

(2) For the purpose of this section, leave with pay shall be granted on the death of husband, wife, mother, father, son, daughter, brother, sister, grandfather and grandmother of either the employee or his spouse, or any relative of the relative of the employee or his spouse who was actually living in the immediate household of the employee at the time of death or at the commencement of the final illness or accident.

(3) Bereavement leave is to be separate from and shall not be charged to sick leave or vacation leave.

SECTION 4. The Board of Police Commissioners may, in its discretion, permit members of the Department, for especially meritorious services rendered by them in the performance of their duties, to receive rewards, gifts or gratuities tendered them for such services. In each and every case, application shall be made to the Board of Police Commissioners in writing through the Chief of Police for permission to receive rewards or gifts or gratuities, and it may be granted or not as the Board of Police Commissioners may deem proper. The nature or amount of the reward or present shall be stated in the application.

SECTION 5. A member of the Department shall, subject to the provisions of the law, be indemnified in such amount as may be recommended by the Board of Police Commissioners for expenses or damages to person, personal property, or for medical or hospital bills for injuries sustained by him while legally acting as a Police Officer. The Board of Police Commissioners shall recommend such payments as may be passed by the Indemnification Committee, which shall consist of the Chairman of the Board of Police Commissioners, the Chief of Police, the City Physician and a member of the Law Department of the City of Springfield.

RULE 32. CHARGES AND HEARINGS

SECTION 1. In order to initiate a complaint against members of the Police Department, an aggrieved person may request a complaint form, which is available through the Officer in charge at Police Headquarters and any other designated location.

Aggrieved persons telephoning complaints shall be advised that only by filing a written form in person can uniform procedural follow-up be assured.

Letters of complaint shall be similarly answered by return mail with forms enclosed.

Complaint forms shall include the following information: Complainant's name, address, date of birth, and social security number; employer's name and address; location and time of incident, along with a detailed statement of the alleged misconduct, and should include as far as possible, the name and rank of the Officer complained of, as well as his identification number and physical description and also the names and addresses of all witnesses to the incident.

Complaint forms are to be completed in duplicate and signed by the aggrieved person, and filed by him personally at Police Headquarters or other designated locations. The aggrieved person's signature should be witnessed by an adult person. The complaint must be filed within thirty (30) days of the alleged incident, unless circumstances would prohibit such filing.

SPRINGFIELD POLICE DEPARTMENT

CITIZEN'S COMPLAINT FORM

Name of Aggrieved Person: Address: Phone:

Employer: Address: Phone:

Date of Birth: Social Security No.:

Personnel Complained About:

Name: Rank: Badge #

Description:

Name: Rank: Badge #

Description:

Nature of complaint: (describe in your own words everything you consider necessary for the police to investigate your complaint, such as the date, time location, place, etc.) Use another sheet if necessary.

WITNESS:

Name: Address: Phone:

Name: Address: Phone:

I understand that I will be informed of the result of the Police investigation and the disposition of my complaint. I am (an not) willing to testify at any hearing in this connection. I have read the above statement of complaint and it is true and accurate to the best of my knowledge.

Signature _____ Witness _____

Aggrieved Party

Received at: Date: _____

Signature of Receiving Officer

Complaint forms will be received by the person in charge at the front desk, who will return a copy of the complaint to the complainant at that time, with his signature, date and time acknowledging receipt of the complaint affixed thereto.

The complaints are to be forwarded, as soon as possible, to the Office of the Chief of Police, where it will be logged in and a serial number assigned.

Complaints such as an alleged discourtesy or comparable act shall be characterized as "minor" and settled informally by the Chief of Police or his designee.

Such disposition shall be noted on the complaint form and need not be investigated in the manner described hereafter.

Complaints of a more serious nature such as extortion, assault and battery, false arrest or imprisonment, use of excessive force, illegal entry by trespass, etc., shall be investigated.

Such investigations shall be made by the internal investigation unit.

The investigating Officer from internal investigation unit shall advise the respondent of the complaint and permit him to read it before obtaining his statement concerning the allegations against him.

A more detailed statement shall be taken from the aggrieved person, as well as from witnesses or other persons with information relevant to the complaint.

Within ten (10) calendar working days after the receipt of a complaint by the Police Department, the investigating Officer will make a written report to the Chief of Police. Such report shall include a recital of the facts found, a conclusion as to whether based on these facts, a reasonable person considering all the facts known, could, but not necessarily, would find that the alleged misconduct occurred. If the investigation has not been completed within ten (10) day period, the investigator shall submit a preliminary report to the Chief of Police at the end of said time, giving such information in each of the fore-

going categories as is then available, and explaining the reasons for the delay. If circumstances (copy illegible)

throughout this procedure cannot be observed, then it is contemplated that the time periods would be extended to such reasonable limits as may be required; provided however that such extensions do not conflict with any applicable statutory provisions.

Upon receipt of a concluding report, the Chief of Police shall acquaint the Board of Police Commissioners with all of the facts. They may order a formal hearing held or take whatever action deemed appropriate.

Within seven (7) working days, the aggrieved parties are to be notified in writing of the decision and contemplated action.

Before any action affecting employment or compensation is taken, the respondent must be advised in writing pursuant to Section 41, through 45, of Chapter 31 of the General Laws.

If within ten (10) days after notice of determination, the aggrieved person filed with the Board of Police Commissioners a written request for an informal conference in order to discuss the allegations and the reasons why further consideration should be given, such request should be allowed upon the presentation of new evidence.

The Board of Police Commissioners shall forthwith state a decision on whether or not reconsideration is in order.

In the event a hearing is given, the Board of Police Commissioners shall arrange for the hearing to be held at a mutually convenient time. The hearing should be held with a reasonable time after it is ordered and written notice shall be given to all parties at least seven (7) days prior thereto.

All parties at the hearing have the right to be represented by counsel.

The hearing shall be conducted in accordance with the Massachusetts General Laws.

The evidence should be presented to the Board of Police Commissioners by the City Solicitor or his designee.

The purpose of the hearing is to determine the exact truth. The fact that the Board members are not all lawyers is proof in itself that the hearing is not expected to be conducted according to the strict rules of evidence. The hearing should be conducted so as to guarantee all of the rights and privileges generally recognized by law.

Evidence should be admitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely on in the conduct of serious affairs. Every party should have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence, as well as the right to a summation at a close of evidence.

The testimony taken should be under oath and in the presence of a qualified stenographer, when requested all expenses including transcribing shall be paid by the party so requesting.

If misconduct is determined, the Board of Police Commissioners shall follow the procedures as mandated by General Laws, Chapter 31.

If misconduct is not determined, the respondent shall be exonerated. Nothing in these procedures shall be construed to deny the Police Officer any civil service rights he shall have under the Laws of the Commonwealth.

SECTION 2. Any member of the Department may be punished by the Board of Police Commissioners by reprimand, forfeiture of pay, or required to serve extra tours of duty without pay, suspension from duty without pay, reduction in

rank or grade, or dismissal from the Department, as provided in the City Ordinances and the Laws of the Commonwealth of Massachusetts, on conviction of any of the following offenses to wit:

Ignorance of the Rules and Regulations of the Department
Neglect of Duty, which includes tardiness at roll calls or drills
Intoxication
Insubordination
Immoral Conduct
Any illegal Offense
Absent without leave
Disrespect to a Superior Officer of [*sic*] Officer of Rank
Conduct Unbecoming an Officer
Neglect or Disobedience of Orders
Sitting down while on Foot Patrol Duty
Continued Neglect to Pay Just Debts
Any Act of Abusive Conduct or Oppression
Contracting a Debt under Fraudulent Pretenses
Conduct Injurious to the Public Peace or Welfare
Failure to Report any Known Violation of the Law
Not Properly Patrolling his Post during his Tour of Duty
False Statements, Cowardice, or Failure to support a fellow Officer in time of need or peril
Any Act Contrary to the Good Order and Discipline of the Department
Failure to Properly Check Doors and Windows of Business Places, Schools, and Churches on his Post during his tour of Duty
Uncleanliness in Person or Dress
Wilful maltreatment of a Prisoner
Violation of any Rule Contained Herein

SECTION 3. In the event that a Police Officer is arrested or summonsed into Court as a defendant on a criminal complaint, the Officer involved shall immediately notify the Board of Police Commissioners and the Chief of Police in writing. The action of the Court in such a case shall be a guide to Police Commission action. If accord and satisfaction or other settlement of a case in which a Police Officer was a defendant is made, such settlement shall not affect investigation and action by the Police Commission.

SECTION 4. Any member of the Department who may be incapacitated by reason of a prolonged mental or physical condition, may be dismissed or suspended from duty without pay after a hearing and as provided by the Laws of the Commonwealth of Massachusetts.

SECTION 5. No person appointed to this department shall be regarded as a permanent employee until he has actually performed the duties of his office for a probationary period as provided by the Massachusetts General Laws. If the conduct or capacity of the member serving a probationary period, or the character or quality of Commissioners, the said Board may, at any time after such person has served thirty days, and prior to the end of such probationary period, give such member a written notice to that effect, stating in detail the particulars wherein his conduct or capacity, or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The Board of Police Commissioners shall, at the same time send a copy of such notice to the Director of Civil Service. In default of such notice, the appointment of such person shall become permanent upon termination of such period.

RULE 33 DEPARTMENT MEDAL OF HONOR AND DEPARTMENTAL RECOGNITION

SECTION 1. The Board of Police Commissioners may, upon investigation and by unanimous vote, award the Department Medal of Honor or the Certificate of Meritorious Service.

SECTION 2. The Chief of Police may, upon investigation, award the Certificate of Commendation.

SECTION 3. The Department Medal of Honor shall be awarded only for a particularly meritorious act involving knowledge of the risk assumed in the intelligent performance of Police duty and at personal hazard of life.

SECTION 4. The Certificate of Meritorious Service shall be awarded only for an exceptional act of bravery, or for some particularly commendable conduct in the intelligent performance of Police duty, or at the discretion of the Commission, in recognition of the awarding of ten or more Certificates of Commendation to an individual member of the Department.

SECTION 5. The Certificate of Commendation shall be awarded for acts of faithfulness of a special nature, or notable skill or bravery in the itelligent performance of Police duty.

SECTION 6. The Department Medal of Honor shall consist of a circular plaque, 1⅝" in diameter, suspended by two chains from a crossbar and the plaque shall be a second bar 1½" long and ¼" wide. On the top crossbar shall be inscribed "FOR VALOR". On the center of the face of the medal, shall be engraved the Seal of the City of Springfield, surrounded by a wreath as a margin. Between the Seal and the wreath on a raised circle shall be inscribed the words "Department of Police, City of Springfield, Massachusetts". On the reverse side of the medal shall be engraved "Presented to ---------- ------- (the name and rank of the recipient shall be inserted here) with the date of its award inscribed below the name.

The material of which this medal is to be made shall be fourteen carat heavy gold, and the lettering shall be of blue enamel.

SECTION 7. The medal awarded, as above, becomes the private property of the recipient, and shall be worn by him on all occasions of ceremony and parade.

SECTION 8. Certificates of Meritorious Service and Certificates of Commendation shall be engraved or embossed certificates bearing the name of the recipient, and the date of the award, and shall be signed by the Mayor, the Chief of Police and the Commissioners.

SECTION 9. All commendations shall be duly entered upon the record, and shall be read at the two roll-calls next succeeding the receipt thereof.

SECTION 10. A member of the Department who, having received either the Certificate of Meritorious Service or the Certificate of Commendation, and who is subsequently designated for a similar award shall receive all the honors and recognitions attached thereto without the issuance of a duplicate certificate.

RULE 34. OFFICIAL INSIGNIA FOR POLICE COMMISSIONERS

An official insignia maybe used by the members of the Board of Police Commissioners on their private automobiles. This shall consist of a circular insignia of blue enamel four inches in diameter. On the center of the face shall be the design of the Municipal Group of the City of Springfield, and the words "POLICE COMMISSIONER, SPRINGFIELD, MASSACHUSETTS" shall be inscribed.

RULE 35. INTERNAL INVESTIGATING UNIT

SECTION 1. An internal Investigating Unit is hereby established under the supervision of the Chief of Police, who shall

assign (on a six-month rotating basis) a Deputy Chief of Police to implement the functions of this Unit. The Deputy Chief of Police shall have such personnel to assist him in performing his duties hereunder as he requires and as the Chief of Police approves.

SECTION 2. The Internal Investigating Unit shall investigate any matter referred to the Deputy Chief in charge thereof by the Chief of Police, any citizen complaint filed pursuant to Rule 32 hereof, any matter affecting members of this Department referred to the Deputy Chief by any law enforcement official, any citizens complaints pertaining to the members of the Department, and any reports received pursuant to Section 35 of Rule 29 hereof.

SECTION 3. This unit shall actively pursue a course of investigation concerning members of the Department, regardless of whether complaints have been received, in order to determine if there are any violations by members of this Department of laws or Rules and Regulations of this Department.

SECTION 4. The Deputy Chief of Police in charge of this Unit shall promptly report in writing to the Chief of Police the existence of any complaint, and the existence of any investigation which had not been referred to him by the Chief of Police. At the conclusion of any investigation, the Deputy Chief of Police shall transmit the conclusions he arrived at as a result of the investigation, and his recommendations in writing to the Chief of Police. The Chief of Police shall transmit the report of the Deputy Chief, together with his recommendations, to the Board of Police Commissioners promptly after receiving the same.

SECTION 5. The Deputy Chief of Police in charge of this Unit shall report to the Chief of Police any recommendations he deems adviseable for amendment of these Rules and Regulations, or for the issuance of written orders by the Chief of Police for the more efficient operation of the Department,

based on any matters coming to his attention while in charge of this unit.

Rule 36. OATH OF OFFICE

Every person, upon entering the Department, shall take the following obligation: "I _____, do so solemnly swear that I will bear true faith and allegiance to the UNITED STATES OF AMERICA and the COMMONWEALTH OF MASSACHUSETTS, and will faithfully support the constitution and laws thereof, -------- so help me God.

"I do further swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me as POLICE OFFICER of the CITY OF SPRINGFIELD and I hereby accept the office of _____ on the POLICE DEPARTMENT of said CITY OF SPRINGFIELD and agree to obey and be bound by such rules and regulations as are or may be, from time to time, laid down for the government of the POLICE DEPARTMENT thereof, -------- So help me God."

Every person appointed to the Police Department, and every employee, upon their entering upon their duties in this Department, shall sign a copy of the following wording, which copy shall be kept on file in the office of the Administrative Assistant.

"Having read a copy of the Rules and Regulations of the Department of Police of the CITY OF SPRINGFIELD, I hereby accept my appointment as _____ in the said DEPARTMENT, and agree to abide by the said Rules and Regulations as they now exist or any future change in or amendments thereto."

These rules may be changed by the Board of Police Commissioners at any legal meeting.

RULE 37. LEAVE OF ABSENCE

LEAVES OF ABSENCES WITHOUT PAY:

Upon thirty days notice to the Chief of Police, members of the Springfield Police Department will be granted leaves of absences, without pay, only in the following circumstances, with the approval of the Board of Police Commissioners:

1. Pregnancy — Maternity Leave: Such leave is to terminate not more than 1 year after the commencement of the leave.
2. Military leave — To any member inducted or called to active duty in any branch of the Armed Forces of the United States. A copy of the induction notice or orders shall be filed with the Office of the Chief of Police.
3. Prolonged illness, following certification of the City Physician.
4. Professional improvement in terms of furthering education in Police work and any activity which would benefit the Springfield Police Department, as determined by the Board of Police Commissioners.
5. Leave of absence will not be granted for the purpose of seeking or engaging in other employment.
6. The Chief of Police, and in the event he is not available, the Deputy Chief of Police may approve up to seven (7) days leave of absence, without pay, in the case of an emergency.

The Board of Police Commissioners will be notified of all emergency leaves of absence granted by the Chief of Police or Deputy Chief of Police.

RULE 38. UNDERWATER SEARCH AND RESCUE UNIT

SECTION 1. Responsibility

a. There shall be a Springfield Police Department Underwater Search and Rescue Unit.

b. This unit will be under the direction of the Uniform Deputy Chief of Police.

c. The Commanding Officer on duty will be responsible for the unit when activated for service.

SECTION 2. Requirements

a. The unit will be limited to Police volunteers who hold a certified divers certificate from one of the following organizations:

1. The National Association of Underwater Instructors (N.A.U.I.)
2. Professional Association of Underwater Instructors (P.A.D.I.)
3. National Association of Scuba Diving School (N.S.D.A.)
4. Y.M.C.A.

A copy of the Police Officers certificates will be forwarded to the Chief's Office and placed in the unit's file.

SECTION 3. Unit Responsibility

a. The unit will be responsible for recovery of victims' bodies from bodies of water.

b. Stolen property submerged in water.

c. Any other detail that is in keeping with the workings of an Underwater Search and Rescue Unit.

SECTION 4. Designation of Dive Master & Asst. Dive Master

a. The Chief of Police will designate one of the Police Officers as a Dive Master and two Police Officers as assistant Dive Masters.

SECTION 5. Duties of the Dive Master

a. The Dive Master shall have, regardless of rank, overall operational control of the unit at the scene of an incident, under the direction of the ranking officer in charge.

b. The Dive Master shall forward a complete report on each response to an emergency incident that the unit is assigned to. The report will include:

1. Names of unit members responding.

2. All pertinent information associated with the incident.

3. The total amount of oxygen used by the unit while at the incident area.

c. The Dive Master will maintain performance and attendance records of unit members at required drills and emergency responses.

d. The Dive Master will be responsible to see that each member of the unit keeps his certificate current.

e. The Dive Master will maintain a training program for this unit.

f. The Dive Master will submit reports to the Chief's Office regarding the training program of the unit.

SECTION 6. Duties of the Assistant Dive Masters

a. The Assistant Dive Masters shall cooperate with and assist the Dive Master in the operation and training of the unit.

b. In the absence of the Dive Master, the Assistant Dive Masters will be in charge of the operation of the unit and will assume all the duties and responsibilities of the Dive Master.

SECTION 7. Operational Procedures

a. Each Deputy Chief and Commanding Officer will receive a list of the members of the unit with their current telephone numbers and home addresses.

b. The Uniform Commanding Officer, whenever a call is received for the services of the unit, will call the Dive Master and in his absence, the Assistant Dive Master.

c. The Commanding Officer will muster the necessary members of the unit.

d. The members of the unit called, will proceed with all dispatch as directed, with their diving equipment.

e. The Commanding Officer on duty may assign a Police van and or boat to the Dive Master and in his absence the Assistant Dive Master for transportation.

SECTION 8. Equipment

a. The equipment will be owned and maintained by the Officer.

b. The City of Springfield will replace or repair any equipment damaged while on duty.

c. The City of Springfield will supply all oxygen to be used by this unit in training and when on duty.

SECTION 9. Service to Other Departments

a. The unit will be allowed to respond to request for assistance if the Commanding Officer on duty feels that the request is warranted.

b. The Commanding Officer will use the same procedures for mustering the personnel as if the unit was responding to a call in the city.

SECTION 10. Injury to Unit Members

a. The Springfield Police Department will be responsible for all bills for injuries occurring to a member of the unit while on duty in accordance with the current Rules and Regulations of the Springfield Police Department.

SECTION 11. Insignia of Unit

a. Unit members will be allowed to wear a Scuba Diving Patch on his right sleeve, one half inch from the shoulder sleeve seam.

b. Copy of insignia below.

SECTION 12. Medical Exam

a. Before a Police Officer can be accepted into the unit, a physical examination will be required to insure that he meets

accepted and approved medical standards for divers. The physical will be given by the Assistant City Physician. The City Physician shall submit a report indicating that the Police Officer is physically qualified to perform the duties of a diver.

RULE 39. K-9 UNIT

SECTION 1. The Canine Unit shall be assigned to and under direction of the Deputy Chief of the Uniform Division. The K-9 handler will be allowed to wear on their uniform a special K-9 patch and special pin. The patch will be worn on the right sleeve, two (2) fingers from the shoulder. The pin will be worn on the left breast over the badge. The duty hours for the K-9 team will be the normal tour, except the K-9 team will be excused one half (½) hour early for the care and cleaning of the K-9. Whenever there is a need the K-9 team will be required to stay on duty.

SECTION 2. PURPOSE: The K-9 unit is established to provide highly trained teams (dog and handler) to assist in all aspects of Police work. The K-9 unit is capable of accomplishing the following:

1. Tracking: Location of missing persons (civilian or criminal) in either a field or enclosed area such as a building.
2. Preventive patrolling of high crime areas.
3. Building searches and apprehension of criminals.
4. Controlling crowd when the safety of the public requires.
5. Detention of criminals.
6. Public demonstrations (public relations programs).

SECTION 3. RESPONSIBILITY OF OFFICERS DESIGNATED AS K-9 OFFICERS: K-9 Officers will be responsible to conduct all duties as assigned with specific responsibilities as follows:

a. Crime Prevention patrolling.

b. Field and Building searches as required.

c. Assist in the apprehension or prevent escape of person who Officer believes to have committed a crime.

d. Assist in the apprehension of persons suspected of a crime when all other reasonable efforts to apprehend or prevent escape has failed.

e. Assist other Officers of the Department as necessary or required.

f. Assist outside law enforcement officials when needed and authorized.

g. Decide on tactical employment of the dog and ability to accomplish a given task.

h. The Superior Officer at scene, or the Commanding Officer shall decide on the use of other uniformed Officers at the scene as it pertains to the K-9 teams objective.

SECTION 4. PROCEDURE FOR OFFICERS AT THE SCENE (other than K-9)

When it is determined that a K-9 team is required other Officers at the scene will conduct themselves as follows:

1. Secure all the area until K-9 team arrives.
2. Do not contaminate the area in any way (physical presence or chemical) to the degree possible.
3. Assist the K-9 team only as requested by K-9 Officer or Supervisor.
4. Use common sense when working with K-9 teams.
5. Keep away from windows and doors.
6. Keep loud noises to a minimum.
7. Avoid excessive talking while K-9 team is working.
8. Extinguish all lights and lighting (flashlights, etc.).
9. Keep area clear of civilian personnel.

SECTION 5. PROCEDURES TO BE FOLLOWED BY DEPARTMENT PERSONNEL IN USE OF THE K-9 UNIT:

1. Building Searches: The following procedures will be followed when K-9 teams are requested for search of building:

a. When a need for K-9 team is established, the Officer will request assistance through his Commanding Officer.

b. Reporting Officer will seal the suspected area by all means possible within the limits of his capability and request where possible, additional units to assist. The Officer(s) will take particular attention to not entering the suspected building and contaminating the area, unless told to do so by Supervisor personnel.

c. When the K-9 team arrives, the Officer in charge will brief the team on the current aspects of the situation, paying particular attention to the location of exits, concealed areas and movement. If shots have been exchanged or heard, the Officer will advise the K-9 team of same, so K-9 team along with the Commanding Officer on the scene, may devise best action to be used.

d. The K-9 team will enter the building in accordance with proper Police procedures and allow the dog to search the area. Prior to entering and where possible the suspect will be advised that K-9 team(s) will be used.

e. The Officers on the outside of the building will not enter the site while the team is working unless specifically asked by the K-9 handler or ordered to do so by a Superior Officer or Commanding Officer. They will secure all possible avenues of escape and eliminate as much noise as possible in order not to distract the K-9 team.

f. If the suspect is apprehended by the K-9 team, the handler will request assistance from other Officers if needed. All apprehended personnel will be turned over to the reported Officer for prosecution unless otherwise stipulated by watch Commander or Supervisor personnel at scene.

g. Upon completion of the detail, the K-9 team will return to its normal duty activities.

2. Field Searches: The following procedures will be followed when K-9 teams are requested or required to conduct field searches:

a. When a need for K-9 team is established, the Officer will request assistance through normal channels.

b. Officers, while waiting for the K-9 team, will take all precautions necessary to protect all evidence making sure not to handle ANY materials which may be used by the K-9 team in the accomplishment of the search. Once handled, the evidence becomes contaminated with the scent of the Officer and may confuse the dog and render the team inoperative. The dog will pick up the freshest scent available.

c. Once the K-9 team arrives, the procedures as outlined in paragraph 1c will be followed.

d. The K-9 Officer in concurrence with Commanding Officer will establish the procedures to be used.

e. In the event of a stolen or abandoned vehicle, the Officers will remain at least ten (10) feet from the vehicle and not enter under any circumstances so as not to contaminate the area.

f. Once the detail has been completed, the K-9 team will return to its normal duty activities.

3. Crowd Control: When a K-9 unit is dispatched to control a crowd for the safety of the public the following procedures will be adhered to:

a. When a need for K-9 team is established, the Officer will request assistance through his Commanding Officer or Superior Officer at the scene.

b. Dogs will remain ON LEASH during this type of operations and not released. The use of K-9 teams for crowd control constitutes a SHOW OF FORCE. As in all actions dealing with the public, COMMON SENSE prevails. Act ONLY as necessary.

SECTION 6. ADMINISTRATIVE PROCEDURES FOR K-9 TEAMS:

1. Dog Bites: It will be the responsibility of the K-9 Officer to file all required reports of dog bites as established procedures dictate. A copy of this report should be maintained in historical file for future reference or evidence.

2. A K-9 will be removed from duty if any injury results from his biting a person or other animal. An investigation of any injuries resulting from use of a K-9 will be conducted by the I.I.U. and a report of such investigation submitted to the Chief. The K-9 will not be allowed to return to duty following any such incident without approval of the Commanding Officer on duty.

3. Injury to Dog: In the instance where the dog sustains injury as a result of line of duty work, the K-9 Officer will determine the ability of his animal to continue with the mission. The defense of the K-9 Officer's decision will be his alone. The K-9 Officer will be responsible for the health, security and safety of his animal at all times. The K-9 shall be examined by the S.P.C.A. yearly or as required.

4. Training/Retraining: Initial training of the dog is required for street use. Once the K-9 team has been trained, a retraining cycle will be established by the respective handler with a log to be kept, recording the hours and types of training done.

5. The K-9 handler will avoid unnecessary exposure of the K-9 to other dogs or members of the public.

6. The K-9 handler will be issued a portable handi-talkie unit whenever he is on duty.

7. The K-9 handler will be responsible for the care and cleaning of his K-9.

8. Food and equipment for the K-9 will be furnished by the Department as needed.

SECTION 7. GENERAL ORDERS TO BE FOLLOWED (Do's and Don'ts):

1. When apprehension is made, DO turn suspect over to the Officer requesting the assistance for prosecution. If for any reason this cannot be accomplished, the K-9 Officer will be responsible for prosecution.

2. DO seek medical attention whenever a K-9 bites. It is the responsibility of the Officer requesting the K-9 team assistance to insure that the person receive immediate medical attention. The K-9 handler will be responsible for all administrative requirements and reports concerned with the bite of his dog.

3. DO allow the K-9 Officer to complete any and all reports pertaining to their duties and responsibilities as K-9 Officers.

4. DO notify another K-9 Officer or member of the K-9 Officer's family to control the dog if the Officer is injured.

5. DO attempt to get the injured K-9 Officer to control the dog even though he is injured.

6. DO allow the K-9 officer the decision to employ his animal. The K-9 Officer is the only individual who knows the capabilities and limitations of his dog.

7. DO NOT accompany the K-9 team during the process of a tracking or building search unless specifically requested to do so by the K-9 Officer.

8. DO NOT tease the dogs. Officer on the scene should treat the animals with respect. USE COMMON SENSE.

9. DO NOT feed the K-9 ANY food without the expressed approval of the K-9 Officer.

10. DO NOT pet or touch in any way, the K-9 without the expressed permission of the K-9 Officer.

11. DO NOT approach the dog if the handler is injured if possible. If fatality will occur as a result of delayed medical treatment, Officers will take all necessary steps needed to aid fallen Officer. Remember a dog can be replaced, a human cannot.

12. DO NOT interfere with the K-9 team. The K-9 Officer shall be the only persons to direct the actions of the K-9 team.

13. DO NOT request K-9 assistance in situations which will not allow the dog to perform. These instances are such things as inclement, wet weather; in areas where large crowds of civilians gather, shopping centers and stores, family dispute calls, or any other such situations where the use of the K-9 will be limited or of no value. ONLY THE K-9 OFFICER knows the limitation of his animal.

SECTION 8. PUBLIC RELATIONS:

1. The K-9 and handler will not appear before groups for public relation purposes without permission of the Chief of Police.

2. K-9 teams may not be used on additional paid details except for public relations purposes.

RULE 40. POLICE OFFICERS MOUNTED

SECTION 1. The Police Officer assigned to mounted duty shall adhere to the Rules prescribed for such type of service and shall be subject to all Rules and Regulations prescribed for foot police officers in so far as they do not conflict with the specific rules applying to mounted duty.

SECTION 2. A Police Officer assigned to mounted duty shall, during his hours of duty except as may be otherwise provided, constantly patrol the streets and alleys within the limits of the territory to which he is assigned, and perform any other duties that may be subscribed by his Commanding Officer.

SECTION 3. A Police Officer assigned to mounted duty, in case of emergency, will release traffic post Police Officers for brief periods of time at street intersections and his territory and direct a movement of traffic until the relieved Police Officer returns to his post.

SECTION 4. A Police Officer assigned to mounted duty shall train his mount to walk at a rapid pace, but shall not urge the animal beyond the necessities of Police business.

SECTION 5. A Police Officer assigned to mounted duty shall be responsible for his mount and equipment while on duty, and shall promptly report in writing to the Chief of Police any sickness, accident or injury to his mount.

SECTION 6. A Police Officer assigned to mounted duty shall be humane in his treatment of his mount, he shall be held directly responsible for any abuse to which the animal may be subject to while in his charge.

SECTION 7. A Police Officer assigned to mounted duty shall remain with his horse at all times while on duty, and shall not leave it unattended except when absolutely necessary in an emergency.

SECTION 8. A Police Officer assigned to mounted duty shall not allow his mount to stand without exercise for more than 48 hours except by order of a veterinarian surgeon.

A Police Officer assigned to mounted duty shall see that everyone treats his mount properly and shall report any case of neglect or ill treatment to the Chief of Police.

All rules, regulations or orders inconsistent with this set of Rules and Regulations are hereby repealed.

RULES APPROVED AND ADOPTED, September 2, 1981.

BOARD OF POLICE COMMISSIONERS

_____ Chairman

_____ Vice-Chairman

_____ Secretary

_____

_____

AS AMENDED, April 6, 1983.

BOARD OF POLICE COMMISSIONERS

_____ Chairman
_____ Vice-Chairman
_____ Secretary
_____
_____

Relevant Portions of Transcript.

[63]

Q. Now, I think you testified that that in your opinion was some four or five hundred yards ahead of you?

A. Yes, sir.

Q. Now how fast were you going if you remember, as you proceeded south on Roosevelt Avenue, to the point where you ultimately found these vehicles stopped?

A. At that point I wasn't going very fast because I was coming down to the lights at Bay Street.

Q. Well, after you went through that traffic light, did you then accelerate?

A. Yes, I did.

Q. How fast if you remember were you going after you went through that traffic light to the point you found the vehicle stopped?

A. Probably fifty, sixty miles an hour.

Q. And if you know, did the distance between yourself and this procession in front of you increase or decrease during that period?

A. It increased.

[64]

Q. Increased?

A. Yes, sir.

Q. And do you know what or do you have an estimate of what would have been the maximum distance between you and these other vehicles?

A. I couldn't tell because when they went around the corner I lost them again until I came around the corner and they were just about stopped up at Roosevelt Terrace.

Q. You came south on Roosevelt Avenue and passed the fire alarm headquarters, and the road straightens out; at that point could you see those vehicles?

A. Yes, sir.

Q. And at that point, were they fully stopped or were they in the process of stopping?

A. I believe they were in the process of stopping then.

Q. What would be your estimate of the distance between that point where you first saw them, and where these vehicles which were in the process of stopping?

A. Probably five, six hundred yards.

[65]

Q. And did you proceed at the speed you have described to us, 50 to 60 miles an hour up to the location?

A. Yes, sir.

Q. And in your best estimate, Officer Reigner, how long did it take you to cover that distance?

A. Twenty seconds. Twenty, fifteen to twenty seconds.

Q. Fifteen to 20 seconds?

A. Somehwere in there.

Q. Now, I believe you testified Officer Reigner, to seeing Mr. Thurston in handcuffs on the ground at the point when you arrived?

A. Yes, sir.

Q. And do you remeber, do you have a memory of whether Mr. Thurston was fully cuffed or in the process of being cuffed; you were questioned by Mr. Gordon about that. What is your best memory now?

A. I believe when I was pulling up he was in the process of being handcuffed. When I actually got out of the cruiser and went around to the side he already was in handcuffs.

Q. Now, if there was any beating with clubs [66] or anything of that nature as has been suggested, would that have had to have taken place during that period of time as you approached the vehicle or this group of vehicles from the fire alarm headquarters?

MR. GORDON: Objection.

THE COURT: Sustained. He could't know.

Q. (BY MR. COYLE) Now, after you transported Mr. Thurston to the hospital, did you have any further duties, Officer Reigner?

A. Yes, I did.

Q. What were those duties?

A. Well, subject was under arrest at that time.

Q. So you remained at the hospital as his guard; is that correct?

A. Yes, sir.

Q. No other questions, your Honor.

THE COURT: Mr. Pikula, do you wish cross-examination?

MR. PIKULA: The City has no questions of this witness.

THE COURT: Any redirect?

[67]

REDIRECT EXAMINATION BY MR. GORDON

Q. You were there to guard him you say?

A. Yes, sir, it's one of my duties.

Q. I see. Well, didn't you in fact stay outside of the hospital after you delivered him?

A. No, sir.

Q. You didn't stay outside?

A. No, sir.

Q. Again, you do recall testifying on a prior occasion, don't you, in an inquest and you were asked some questions and again, I'd like to respectfully invite your attention to this question at the foot of page 21, would you read that to yourself, lines 22 and 23, and then go onto your answer on page 22, please.

You recall that testimony now?

A. Yes, sir.

Q. So when you were asked this question, "Was there any further noise from him at the hospital", what was your answer?

A. "None that I could tell. Whey all rushed [68] him by and I was just standing outside".

Q. Standing outside?

A. Yes, sir.

Q. And actually, the other cruiser that came down to assist you in getting this heavy man into the hospital, you didn't assist yourself in getting him into the hospital, did you?

A. Yes, sir. I took him out of the cruiser and onto the stretcher.

Q. That's what you did?

A. Yes, sir.

Q. Then you stayed outside?

A. No, sir. That's outside the room where they took him in. Outside the room but inside the hospital.

Q. "They all rushed him by and I was just standing outside"?

A. Yes, sir.

Q. That's what you meant by that?

A. Yes, sir.

Q. Now, you were just asked by Mr. Coyle about the speeds you were making as you came to the scene where Mr. Thurston was being or was handcuffed [69] and you said that was fifty or sixty miles an hour?

A. Maximum speed I probably got up to going up there, yes.

Q. Under these conditions would this be speeding, I mean if it was someone other than a cruiser would that be speeding?

A. Yes, sir, I believe the speed limit is 35.

Q. It would be speeding; but when you were busy getting to the scene speeding, isn't it a fact that when you were transporting this man in the back seat, making these funny noises, breathing, you weren't speeding then?

A. Yes, sir, I believe I was.

Q. You think you were? What do you rely on in saying that; what part of your memory are you relying on in saying that you were speeding?

A. Because I got him to the hospital as fast as I could.

Q. I'm asking you, sir, that again at the inquest you were asked this question on line 20 — page 20, line 14 through 18, would you read those what you said before?

A. Yes, sir.

[70]

Q. Having read that, do you now agree that it would be fair to say that you testified on a prior occasion that you weren't speeding when you were carrying him down to the hospital?

A. No, sir, I don't believe that's what that says.

Q. Well, why don't you read it? I'll read the question and you read your answer. "Did you transport as if it was a medical emergency, namely lights on and going through intersections and the like"? What was your answer?

A. "Yes, we had to have the lights on but we weren't speeding that much".

MR. MULCAHY: Let him finish the answer, please. Read the rest of answer.

MR. GORDON: I don't object to that. Go ahead.

THE WITNESS: "I mean, we didn't know the extent of the injury or nothing. We were just taking him the best we could without getting involved in an accident on the way".

Q. (BY MR. GORDON) So you didn't go through intersections?

[71]

A. Yes, sir, I believe we did.

Q. You think you did?

A. Yes, sir.

Q. And but would it be fair to say you weren't speeding that much?

A. Not through the intersections.

Q. Not through the intersections?

A. No, sir.

Q. What your're telling the jury now is when you said you weren't speeding that much, what you meant was you meant that to be restricted to intersections?

A. Where it was possible to have a little speed, yes, I did. When we were approaching intersections or something we have to stop even at an intersection.

Q. That's what you usually do?

A. Yes, sir, that's the rules.

Q. And in a medical emergency?

A. Yes, sir.

Q. I see. So in this case, what you're saying is that you probably did go 50 or 60 miles an hour; do you tell us that now?

[72]

A. Yes, sir, I probably did.

Q. But you really don't know, do you? How do you remember that?

A. I just remember bringing him to the hospital the best that I could.

Q. That all you really remember, isn't it?

A. Yes, sir, basically; yes.

Q. That's all I have sir, thank you.

. . . . . .

[125]

Q. Have your done that continuously?

A. Yes, I have.

Q. Now, are you familiar with whether or not the Springfield Police Department has rules and regulations governing the conduct of its officers?

A. Yes, it does.

Q. I wonder if I could show you this document and ask you if you could look it over and tell us if these are the Rules and Regulations of the Department of the Springfield Police Department as you know them?

A. Yes, it is.

MR. MULCAHY: May I just take a look at the date of that?

MR. GORDON: These are the ones that you gave us.

Your Honor, I am offering the Regulations at this time, apparently there is no objection.

MR. MULCAHY: No objection.

MR. PIKULA: I have no objection.

THE COURT: All right, it may be admitted as Plaintiff's Exhibit 7 in evidence.

(Plaintiff's Exhibit #7 described above offered and marked in evidence)

. . . . . .

[132]

A. Yes.

Q. Now, is there a policy and regulation of the Police Department of Springfield applicable in 1981 as to the first warning shots?

A. Yes.

Q. Are warning shots permitted by the Regulations?

A. You have a Rule there that says, I think it is number —

Q. (Interposing) So let us refer now to Page 7 on firearms.

I am again reading and you correct me if I am off on this: Section 13, firearms shall not be discharged, one, as a warning or signal shot, (2) to effect a misdemeanor arrest, and then is there a rule with repsect to firing a gun from a moving vehicle?

A. Yes.

Q. And what do the Rules say about officers firing from moving vehicles?

A. At or from a moving vehicle except when a life-threatening situation or to apprehend a felon, one who has committed a felony in the use of deadly force.

Q. Now, the prohibition here is firing from a moving [133] venicle or at a moving vehicle, is that correct?

A. Yes.

Q. Except when a life-threatening situation exists or to apprehend a felon, one who has committed a felony involving the use of deadly force; in other words — by the way, did you participate in the investigation of this matter?

A. Just the preliminaries.

Q. Did you learn at any time in the course of your investigation that there was a weapon in the Thurston car?

A. No, I did not.

Q. Did you learn that there was a knife in the Thurston car?

A. No, I did not.

Q. Or any club or any instrument of force or deadly force?

A. No.

Q. Did you learn in the course of your investigation that Pamela Etter, the woman associated with Mr. Thurston, had been injured in any way?

A. No.

Q. Or any officer had been injured in any way?

A. Just from the radio transmission that was given.

. . . . . .

[171]

REDIRECT EXAMINATION BY MR. GORDON

Q. Is there in the training of the police officers in the City of Springfield, are there training courses given for officers before they become officers?

A. Yes.

Q. And do they become in the training familiar with the rule about surrendering their guns after they fire them for ballistics examination?

A. To the best of my recolleciton, I think in the Academy they go all through the rules and regulation book.

MR. PIKULA: Objection, your Honor.

THE COURT: What's the objection?

MR. PIKULA: He may acknowledge what he was trained in, but there is no foundation that has been laid for him to comment on the training of other officers.

THE COURT: He may testify as to his familiarity with the Academy, have you been instructing there, Lieutenant?

THE WITNESS: No, Captain Spellacy has.

THE COURT: Are you acquainted with the Academy itself and what it does teach and instruct?

[172]

THE WITNESS: Bits and pieces of it, yes.

THE COURT: Can you answer the question put to you, whether or not during the normal procedures of instructing at the Academy the officers are instructed what to do with their weapons after a bullet has been ejected from it during the course of a case?

THE WITNESS: That I can't tell of my personal knowledge.

Q. You have been consecutively associated with the Department for how many years now?

A. Nineteen and one half.

Q. And as of this moment you don't know of any part of the training where after firing a weapon they are supposed to preserve not only the weapon but the weapon in its condition that it was fired, you don't know what particular training that goes on, on that point?

A. I know they have training but I don't know the specifics on what they teach on that.

. . . . . .

[181]

A. I was a uniform patrolman for four and one half years when I was appointed. I was promoted Sergeant in six years

and I was assigned as a Street Supervisor on the midnight shift for two and one half years.

I went into the Detective Bureau and I worked in it for one year. I was assigned to the District Attorney's Office for five years. I got promoted to a Lieutenant out of the District Attorney's Office and returned to the midnight shift as a Street Supervisor as a Lieutenant for eighteen months.

I was then transferred from the street duty to head of the Police Academy for five years.

I was promoted to Captain out of the Police Academy and took over as Squad C as the commanding officer on the 4:00 to 12:00 watch for about almost two years and at the present time I am in charge of the Traffic Bureau of the Park Police and the Mounted Patrol and I also worked two years in the Internal Affairs.

Q. That is the Internal Investigating Unit?

A. Yes.

. . . . . .

[197]

Q. They endanger the public's safety?

A. I would say so.

Q. They could enter private dwellings?

A. Oh yes.

Q. How recently have you been involved in the training of police officers?

A. I think from 1975 until maybe 1981 or 1976 to 1981.

Q. Is there any refresher course given officers once they become officers?

A. Yes.

Q. And are the matters of firearms reviewed with them?

A. Yes.

Q. Including whether or not to fire warning shots?

A. Yes.

Q. That is something that they are told about?

A. That's correct.

Q. And is there any reason — do you have any reason to know or not know whether Officer Troy or Officer Schaub or Officer Perry were given that kind of refresher course?

A. When I was in the Academy I believe they did, I can't recall because of the numerous amounts of men [198] we have, I would have to go back and look at the reports personally, I don't know.

. . . . . .

[199]

A. No.

Q. Is there any training given by the City of Springfield to officers as to when to use a gun while on a motorcycle?

A. No.

Q. In the course of this investigation or your talking — you did talk with Mr. Perry?

A. When?

Q. Let me try to answer that. On the evening of the 28th, did you talk to him?

A. On the night of the shooting, yes.

Q. You did talk with him?

A. Yes.

Q. What did he tell you?

A. I talked to all officers involved. Perry said he had fired his weapon as did the two others. As procedure would have, they were instructed by me to submit a report to the Chief of Police as the rules and regulations required.

Q Did he say anything other than that he had fired his weapon?

A I don't recall.

Q Did he tell you that he had fired a warning shot?

[200]

A. I believe he did. I believe he told me he had fired a warning shot over the car or in the area of the car, and the car continued coming over to his side of the road.

I don't really recall his statement verbatim.

Q. Did he tell you he thought his life was in danger and he was acting in self-defense?

A. I believe he told me that he felt that this person driving that car was attempting to run him over and he dropped back and the car continued on, and I believe he said he pulled alongside again and the car either came over to his side of the road and would not pull over for him, and he thought that the car was going to strike him and he fired a second time.

Q. And so he told you he pulled up twice?

A. I believe he told me he pulled up twice. The car came at him; he dropped back; he pulled up a second time.

Q. That is he told you that the car had come over to his side of the road?

A. He was on the left-hand side of the car, in other words, if I could picture it, he would be on the [201] driver's side of the car and he pulled alongside the car to have the car pull over and if I can recall, the car swerved toward him. He dropped back and the car continued on.

Then he pulled alongside the car a second time and the car came at him the second time and I believe that is when he fired.

Q. Did he tell you he fired through the driver's window at the head of the driver?

A. No, he didn't say that to me.

Q. Did he tell you that he fired through the driver's window?

A. He told me he fired at the driver.

Q. He told you he intended to hit him?

A. I would assume so.

Q. He told you he fired at the driver?

A. I would say he fired at the driver to protect himself, yes.

Q. That is what he says — that is what he told you?

A. That's correct.

Q. That he fired at the driver to protect himself?

A. Yes.

Q. Although he had previously been able to drop back [202] out of danger?

A. That's correct.

MR. GORDON: Thank you, that's all.

THE COURT: We will take a brief recess at this time.

(Morning recess held.)

* * * * *

THE COURT: Cross examination, Mr. Mulcahy?

CROSS EXAMINATION BY MR. MULCAHY

Q. Captain, would you just briefly tell us what the procedure is at the Springfield Police Headquarters relative to phone calls, 911 calls that come into the Police Department?

A. Some of the calls — if someone calls in on a complaint into Police Headquarters, in the Captains's office there is a monitor. We can monitor the calls coming in and also there is a speaker where we monitor the transmissions.

[203]

Q. These calls are received by the Springfield Department, are they recorded?

A. Yes, they are.

Q. And any comments made by dispatchers going out into the district, are those calls or those instructions recorded?

A. Yes, they are.

Q. And in particular in this particular case, are you aware of the fact that at the Springfield Police Headquarters this equipment was operating on September 28, 1981?

A. Yes, it was.

Q. That a tape has been made and recorded concerning all the radio dispatches eminating from the Springfield Police Department and incoming calls received by the Springfield Police Department in connection with this case?

A. That's correct.

Q. And a tape has been prepared by the Springfield Police Department?

A. To my knowledge it has.

Q. And were you present in the dispatcher's office when this so-called police chase was going on?

[204]

A. Yes, I was.

Q. Is that part of your function to monitor the police chase and to make a determination at some point whether or not to abort it or to continue it?

A. That's correct.

Q. Was that your function at that particular time on that day?

A. Yes, it was.

MR. MULCAHY: Your Honor, I have a tape here I would— I have transcripts, I have made them available to Mr. Gordon and I would like to play that tape at this time for the jury.

THE COURT: Let me see counsel.

(Bench conference.)

THE COURT: Have your read this?

MR. MULCAHY: We made that available to them.

THE COURT : I won't allow this into evidence, but I would explain about the transcripts to the jury, their not being evidence, but they can refer to them.

MR. MULCAHY: The running time is about twenty minutes, your Honor.

THE COURT: All right, do you have here a tape recorder?

MR. MULCAHY: Yes, sir, we have it set up ready to play it. This tape has been in Mr. Gordon's possession for about a year.

THE COURT: Are you offering the tape as an exhibit?

MR. GORDON: I would object —

THE COURT: (Interposing) I wouldn't allow a transcript to go in as an exhibit.

MR. MULCAHY: I'm not going to ask —

MR. GORDON: (Interposing) Part of our objection to this is that there are —

THE COURT: What are you objecting to, the tape?

MR. GORDON: The part of the tape — I have no objection to part of the tape that simply contains the police monitoring of the chase, but I do object to the calls into the Station from persons making a complaint, that is I think there is a Mrs. Gilbert who called in who was one of the girlfriends of Mr. Thurston's girlfriend. I think this statement here are efforts to elicit police interest. [206] I have no chance to cross examine them and they are hearsay. I don't object to the police activity as a result, but I do object to the part where these people call in and being partisans in the matter, state their — for example,

if I give you an illustration, one of the women says he's assaulting her right now. That is a conclusion. It is not helpful and it is hearsay.

MR. PIKULA: We are going to have both witnesses here to testify.

THE COURT: They will be here?

MR. PIKULA: Yes, sir.

THE COURT: The only reason it would be relevant as to it pertaining to the Police Department dispatching of various cruisers and so forth, and that was the procedure that was underway.

MR. GORDON: But not to the truth of the matters, that will come in cross examination of the witnesses themselves when they come forward.

You're saying they are —

MR. PIKULA: Yes.

THE COURT: All right, very well, we will allow the tape to be played.

[207]

(End of bench conference.)

THE COURT: Mr. Foreman and members of the jury, we are going to have a tape played of the evening of September 28th, 1981, and that tape is being introduced into evidence and you're going to be offered a transcription of a written transcription of what the verbal expressions were as expressed over the tape. That is not evidence, but I'm allowing it as an aid for your benefit so that you may refer to it and then listen to the tape itself.

However, I want to express to you very clearly that it is the tape that is the evidence in this case and a transcription has been prepared by the Police Department and if there is anything different on the description that you hear that varies from the written interpretation of the words, it is what you hear that is the evidence and not what you see written.

The transcription will not be allowed as evidence and that will not go to the jury room with you.

Now, with that understanding, the tape may be played. It may be marked as Defendants' Exhibit D in evidence.

[208]

(Defendants' Exhibit D, described above, offered and marked in evidence.)

(Whereupon, the tape was played for the jury and transcripts were provided as an aid in folowing the tape.)

(At the close of the playing of the tpae the transcripts were picked up from the jury.)

MR. MULCAHY: May we continue, your Honor?

THE COURT: You may. Once again, members of the jury, I want to emphasize if there is any discrepancy between what you heard and what is on the transcripts it's what you heard is the evidence.

You may continue, Mr. Mulcahy.

Q. (By Mr. Mulcahy) Captain, right near the end of that transcription there was a reference by the dispatcher that he is right here standing over my shoulder.

Do you know to whom that reference was being made?

A. That was me.

Q. Were you present in the dispatch room all during the [209] entire proceedings involving the police chase?

A. Yes, I was.

Q. It is your function to make a decision as to whether or not you should abort a police chase or high speed pursuit?

A. It is my decision.

Q. What decision, what factors go into your decision as to whether or not you would abort a high speed chase?

THE COURT: What do you mean by abort?

THE WITNESS: To call the chase off, your Honor.

Q. What decision or what factors go into your judgment in assisting you to make that decision?

A. The speed, the location, the speed at the time of the chase and the infraction involved or infractions.

Q. And in this particular case did you make a decision to abort this high speed chase?

A. I made a decision, yes.

Q. What was that decision?

A. To keep the chase going.

Q. Why?

A. The speed in my opinion was reasonable and proper, [210] at fifty miles per hour. There was a felony committed at Beacon Circle from the information that I had, there was someone taken against their will.

Q. That someone was whom?

A. Was Pamela Etter.

Q. Did you have some information in your possession at that time concerning a knife or the possibility of a knife?

A. No, I did not.

Q. Now, Captain, on the 911, the calls that come where we heard were recorded, does a patrolman in the police cruiser hear those incoming calls?

A. No, he does not.

Q. The patrolman in the cruiser assuming he has in service, do dispatch messages sent out from Headquarters, are they disseminated to the entire police-

A. (Interposing) For all cars in service.

Q. All cars if their radios are on and they are receiving all the transmission or all the instructions given by the dispatcher, is that correct?

A. That's correct.

MR. MULCAHY: Thank you, you may inquire.

[211]

CROSS EXAMINATION BY MR. COYLE

Q. Captain, I think you testified earlier that to your knowledge the procedures regarding police officers turning over their firearms and the conduct of those police officers after discharging their firearms are prescribed by ruled and regulations?

A. That's correct.

Q. There is no other procedure except those which are prescribed in the rules and regulations?

Q. That's correct.

A. Captain, is it your opinion that the actions of the officers who discharged their weapons on the 28th of September, 1981 complied with those rules and regualtions?

A. In my opinion, yes, they did.

MR. COYLE: I have no further questions.

THE COURT: All right, Mr. Pikula, does the City have any questions?

MR. PIKULA: The City has no questions.

THE COURT: Is there any redirect examination, Mr. Gordon?

[212]

MR. GORDON: Yes, your Honor.

* * * * *

REDIRECT EXAMINATION BY MR. GORDON

Q. I take it it is your opinion that when Officer Troy indicated to you that he had put a spent cartridge, taken it out of his revolver up at Industrial Park, when in fact he put that in the waste basket at the police garage, is that, in your opinion, in compliance with the rules and regulations?

A. There is nothing in the rules and regulations regarding spent cartridges.

Q. But isn't there something in the rules and regulations about lieing to a superior officer?

A. Are you saying these officers lied to me, Mr. Gordon?

Q. Yes, Officer Troy told you, did he not, that he had put his spent cartridge out at the Industrial Park some four miles away from the Station?

A. That is what he told me.

Q. And the spent cartridge was found in a trash can in the police garage, is that right?

A. Those spent cartridges?

[213]

Q. Whose was it?

MR. MULCAHY: Please, I object to the question. Obviously, the witness doesn't understand. Maybe Mr. Gordon —

THE WITNESS: (Interposing) I understand the question.

THE COURT: If you can answer the question, go ahead.

THE WITNESS: Do I know whose spent cartridge was in the trash container in the police garage?

Q. Yes.

A. Yes, I do.

Q. Whose was it?

A. Officer Schaub's.

Q. Did he tell you he put his cartridge somewhere else?

A. Yes, he did.

Q. What did he tell you?

A. He had it — he said I have my bullets here. I said where is the sixth one. He said I threw the cartridge away. I said where? And he said in the garage. I said go and get it and hand them all to me.

[214]

Q. You thought that was in compliance with regulations?

A. There is nothing in the regulations regarding spent cartridges.

Q. In other words, there is nothing in the procedure in the Springfield Police Department and hasn't been as far as you know that would prevent an officer who fires his gun from simply throwing out his spent cartridges anywhere he wanted?

A. There is nothing in the rules and regulations of the Springfield Police Department that states that — there is nothing in there that to my knowledge that has anything to do with spent cartridges.

Q. So in the training of police officers, there is nothing told to them about saving spent cartridges for ballistic purposes?

A. I don't train them in firearms. I am not a firearms expert.

Q. But you had the training?

A. Yes, I did.

Q. You have been in charge of the school?

A. That's correct.

Q. Right?

A. Yes, sir.

[215]

Q. So that it is your testimony that with the background that you have, having had the training and having been in charge of the training, that you know of no procedure in the City of Springfield Police Department that directs the men, assuming an officer had fired a gun and a civilian had been badly injured or killed by it, there is no procedure that you're aware of in the regulations, no procedure whatsoever in this City of Springfield to have the casing preserved?

A. That's correct.

Q. Is that correct?

A. Yes, sir.

Q. That is the way it has always been too, as far as you know?

A. To my knowledge.

Q. Now, in the transcript here, there is some statements by people calling in, and I take it you monitored some of that, at least the chase part?

A. I monitored it from the original call.

Q. From the original call?

A. That's correct.

Q. When a citizen calls in and says he is beating her [216] up right now, he is beating her up right now, of course, you, as a person, in the police service, you have to believe that?

A. I don't have any choice.

Q. You don't have any choice?

A. Yes.

Q. Because that is the fact that is given to you?

A. Correct.

Q. But when Pamela was taken out of the car and someone called saying he is beating her up now, beating the hell out of her, did she have any marks or bruises on her?

A. I have no idea.

Q. Did the investigation disclose to you that she had any marks or bruises?

A. No.

Q. And then when somebody says or calls in, in other words, let's assume I was visiting somebody who really didn't like me and they wanted to get me arrested, they could call 911 and say that I was breaking in the door and smashing them, is that right?

MR. MULCAHY: I object, your Honor, it's highly speculative.

. . . . . .

[264]

A. No.

Q. Just road bikes?

A. Just road bikes.

Q. So you have had all this experience on road bikes?

A. That's correct.

Q. And that means you have had a great deal of experience in traffic, correct?

A. That's correct.

Q. And how long had you been a motorcycle officer in 1981, sir?

THE COURT: Motorcycle police officer.

THE WITNESS: I would say about six or seven years.

Q. And have you had occasion while riding your motorcycle to pursue speeders?

A. Pursue speeders? You mean chase?

Q. Yes.

A. Never chased anyone.

Q. Never chased anyone?

A. No more than just to follow him down the street and flag him over, but not in an acutal chase.

Q. In other words, you never had any experience in pursuing anyone on a motorcycle any more than half [265] a mile?

A. Pursuing, not a chase.

Q. You have pursued people on the motorcycle, is that correct?

A. Yes.

Q. For how long a distance?

A. No.

Q. How long?

A. Maybe a block or two, and when they see me they pull over.

Q. Have you had anyone — have you ever had to take evasive action on a motorcycle to avoid being hit as a private rider, first?

A. As a private rider, yes.

Q. In other words, sometimes cars won't see a motorcycle and you have to get out of the way, right?

A. When they do see you you have to take evasive actions.

Q. One of the most important skills of a motorcycle rider is his ability, the skill to get out of the way of a moving vehicle, correct?

A. You try.

Q. And you have done that many times, haven't you, before?

[266]

A. Yes, I have.

Q. And doing that, you have avoided an accident that might have harmed you, correct?

A. Correct.

Q. Is that right, Mr. Perry?

A. Yes.

Q. Now, on this evening, September 28, is it your position in this case that you shot Mr. Thurston in self-defense?

A. In self-defense?

Q. Yes.

A. That's correct.

Q. Now, you certainly had an opportunity to drop back, didn't you?

A. That's correct.

Q. You knew how to do that?

A. Yes.

Q. Just like in a fight you can walk away, right?

A. That's right.

Q. And from your police training you know you can't claim self-defense if you have a right to walk away?

A. Not always.

Q. So at some point on that evening you first became [267] aware of a police chase in progress?

A. That's correct.

Q. When did you first become aware of that?

A. I was on Wilbraham Avenue near King Street when I first heard over the radio frequency.

Q. You started up your motorcycle or were you riding at the time?

A. I was riding.

Q. You heard the radio transmission?

A. I did.

Q. And at some point while you were near the Thurston car, did you hear a transmission for you to stop and get out of there?

A. No, I did not.

Q. You didn't hear that on your radio?

A. No, I didn't.

Q. The radio was working that evening, wasn't it?

A. That's correct.

But you didn't hear that?

I did not hear it.

Q. So at some point on Rooselvelt Avenue, I would like to take you to Roosevelt Avenue before the fatal shot.

[268] At some point on Roosevelt Avenue did you see Mr. Thurston's car?

A. Yes, I did.

Q. How far away from you was it when you saw it?

A. I would say almost twice the distance from where I am sitting in the corner of the back of the room over there. (Witness indicating.)

Q. That is the distance you were —

A. (Interposing) When I first observed it.

Q. Between you and the Thurston car, were there any cruisers?

A. Yes, there was.

Q. How many?

A. There was one cruiser between him and myself, that was Officer Schaub's cruiser across the road.

Q. Officer Schaub's cruiser across the road?

A. Yes.

Q. And the cruiser between him and yourself was operated by whom?

A. No, there was no cruiser between Mr. Thurston and myself except for the cruiser adjacent to me which was blocking the road.

Q. Which was blocking the road?

[269]

A. Part of the road it was blocking.

Q. That was at Roosevelt Avenue?

A. Roosevelt and Bay.

Q. So the cruiser was blocking part of the road, right?

A. Part of the road.

Q. Is that a straightaway, a straight view of the street where the cruiser was, what street would you call that, what is the name of that street?

A. This is Roosevelt Avenue going southbound.

Q. Right on Rosevelt Avenue?

A. On Roosevelt Avenue.

Q. Is that an intersection you're talking about?

A. The intersection was behind me. This was prior to the intersection.

Q. So prior to the intersection — all right.

Now, at that time you were not pursuing Mr. Thurston?

A. No.

Q. You were just waiting there?

A. That's correct.

Q. Now, my question is when did you first see him, when you began — when did you first begin to pursue him, let's put it that way?

[270]

A. After he had passed me at that point.

Q. You started up your motorcycle?

A. Yes.

Q. You started pursuing him?

A. That's correct.

Q. What street?

A. On Roosevelt.

Q. And ahead of you between you and Mr. Thurston, could you tell us what kind of vehicles there were?

A. There was three cruisers.

Q. Three cruisers between you and Mr. Thurston?

A. Correct.

Q. And how fast do you think they were all going?

A. At that point I couldn't say how fast they were going, not at that point.

Q. But you were able to go faster than they were?

A. That's correct.

Q. And the three cruisers then, could you tell us now who was operating those cruisers?

A. No, I could not tell you.

Q. You don't know as of now who was in any of those cruisers?

A. It was dark and as I passed them I did not look in to [271] see who was operating them.

Q. Did you later learn there were people in those cruisers that were officers?

A. I assumed they were officers operating all the cruisers.

Q. You assumed the three cruisers were operated by officers?

A. I assumed so.

Q. Now, you know that in this case you have claimed that you shot Mr. Thurston in self-defense because he tried three times to run you off the road, right?

MR. MULCAHY: I object to that, your Honor, because that is not a proper characterization of the defense raised by Mr. Perry, Officer Perry.

THE COURT: You will have the opportunity to put it in in your own words at a later point.

Q. Is that your position, he tried to run you off the road three times?

A. He did.

Q. And he did that, you said, by wiggling and waggling his car, fishtailing his car around — what did he do?

A. He looked back at my position and swerved over into [272] my path of travel.

Q. To the left lane —

A. (Interposing) No, because the right lane is wide enough to accommodate more than one car even though it is not marked.

Q. So the swerving you say was the cause of your shooting him, was swerving that didn't cause him to go over to the left side of the road?

A. No, he did not go the left side of the road.

Q. Nor did you?

A. No.

Q. So this all took place in the right side of the road, this so-called swerving, is that right?

A. That's correct.

Q. Now, with respect to that position, that is that argument or that set of facts that you advance here as the reason for shooting him.

Wouldn't it be important to you to be able to obain from a fellow police officer a verification of the fact that Mr. Thurston had swerved, wouldn't you want to verify that with witnesses?

MR. MULCAHY: Object.

MR. PIKULA: I object.

[273]

THE COURT: Sustained.

Q. Well, on the 28th of September, you were concerned enough to go see a lawyer, right, or contact one?

A. That night, yes, I did contact one.

Q. And the reason for doing that was —

MR. MULCAHY: (Interposing) I object.

THE COURT: I will sustain the objection. The burden of proof still rests on the Plaintiff in this case.

Q. So that when you went to see a lawyer, I'm not asking you what was said, but did you have a chance to talk to him?

A. I didn't go to see a lawyer.

Q. You called him?

A. I called him and he came to the Station.

Q. You talked with him there?

A. Yes, I did.

Q. Now at that time on that evening, did you talk to any police officers in the cruisers behind the Thurston car as to whether they had seen any fishtailing of the Thurston car?

A. I did not ask anyone.

Q. And after the 28th of September, when you were on [274] duty at the same time as those other officers had their tour of duty, from then until December 2nd, the date of the inquest, did you speak to other officers to see if they could back up your position that the car had fishtailed, did you speak to any other officers?

A. I didn't investigate or question other officers involved.

Q. Did you employ anyone to try to verify your position that the Thurston car had fishtailed three times and that is the reason you shot him?

A. No verification of my position.

Q. Did you employ anybody to question these men?

A. No, I didn't ask no one to question anybody.

Q. As a result of your talks with your lawyer about the episode up until the Inquest, were you at some time provided with statements of your brother officers that they had seen this?

MR. MULCAHY: Your Honor, I object. I take quite an exception to Mr. Gordon keep invoking he saw counsel, if that is going to be a problem in this case he is trying to create an inference that is not justified —
[275]

THE COURT: (Interposing) I will sustain the objection. What this witness may have done on his own behalf is immaterial to this particular case, where you're representing the Plaintiff you have the burden to proceed with your case.

He doesn't have the burden of doing anything in this case at this stage.

MR. GORDON: My exception.

Q. Now, after the Inquest took place in December, did you ascertain the names at that time of any officers who were witnesses to this?

A. Again, I state I didn't do any investigation, and I did not question anyone that was for the Department and their attorneys or whether, not me, I don't go asking them for questions or anything. I don't investigate.

Q. Now, as you saw the cruisers ahead of you there were how many, two or three total?

A. There was a couple ahead of me.

Q. And at that time you began to overtake the cruiser?

A. That's correct.

Q. Were you aware at that time that it was improper to a fire a warning shot?
[276]

A. Yes, I was.

Q. And at some point as you overtook the cruisers, was it less thickly settled and it later became, that is, less houses when you first began to overtake him?

A. That's correct.

Q. And as you went along overtaking Mr. Thurston, the houses began to appear on the right, correct?

A. One correction in your question. I did not overtake Mr. Thurston.

Q. You came up to him in his car?

A. Up to the left rear of the car, not overtake.

Q. Up to the left rear?

A. Left rear.

Q. You never get farther than the left rear is your position?

A. Not during the chase.

Q. Well, I'm asking you straight out, did you go forward of the left rear of the car.

A. The only time I went forward of the left rear of the car was when the car came to an complete stop.

Q. So let's talk about the front wheel of your motorcycle, all right.

Did the front wheel of your motorcycle get as [277] far as the left rear wheel of the Thurston car or not?

A. No, not quite.

Q. Not quite?

A. No.

Q. Would it be fair to say that the front wheel of your motorcycle, and I mean the most forward part of the motorcycle, the wheel, did it get to the point of the back of the left rear wheel of the Thurston car, did it get that far?

A. It got to the back of the car, not the wheel.

Q. And you fired from that position?

A. That's correct.

Q. Well, I wonder if you could explain why there is no bullet hole in the car?

A. Sure, the window was down.

Q. The driver's window was down?

A. The driver's window was down.

Q. What you're saying, sir, then is that you fired at Mr. Thurston through the driver's window and hit him from a position back of the left rear wheel, is that what you're telling this jury?

A. That's correct.

Q. Right?

[278]

A. Yes.

Q. How far to the side of him were you?

A. From the car I would say almost from here to the attorney here. (Witness pointing to Mr. Mulcahy, his counsel.)

Q. Mr. Perry could you draw a picture on the board for us just to (ilegible) that car make it about this high, if you would.

A. (Witness complying.)

Q. Those dashes, Officer, respresent the windows?

A. I could say those represent the tire of the car.

Q. Now, could you put in the windows?

A. (Witness complying.)

Q. It is a four-door or two-door car?

A. I don't remember if it was four-door or two-door.

Q. This would be about the front window?

A. That would be approximately where the front window would be.

Q. Was there a back window?

A. Sir, again I can't say, I wasn't checking out the car to buy it.

Q. Well, I would like to show you this photograph, Exhibit B-2 put in evidence by your counsel, is [279] that a fair representation of where the Thurston car came to rest?

A. I would say it is.

Q. A fair representation of the Thurston Car?

A. Yes.

Q. Do you note that it is a four-door car?

A. Yes, sir.

Q. And it has a window in the back door, a window in the front door, and a window to the rear?

A. Yes, sir.

Q. Would you place your motorcycle there where it was at the time that you fired?

A. (Witness complying.)

MR. GORDON: If I may show this to the jury, your Honor?

THE COURT: Very well.

Q. What part of the motorcycle are you showing there?

A. This would be the motorcycle right here and this is the Thurston car and this is the line of travel.

Q. The car is a certain size and could you put in the motorcycle about the length of it, too?

MR. MULCAHY: Now, Mr. Gordon, this is not to scale and he is trying to do the best he can. [280] If you don't like what he puts on — I'm sorry, your Honor, I think we know where Mr. Gordon is going.

MR. GORDON: I wish I did.

THE COURT: I don't know where he is going. Why don't you go ahead and try to answer to the question as best you can.

THE WITNESS: The motorcycle I would say it's maybe as long as this board in length.

Q. Pardon me?

A. The motorcycle is maybe as long as this board here is length, perhaps.

Q. Doing it your way, at the end of your arrow pointing to the motorcycle, is that the front of the front wheel that you put in, is that where the front of the front wheel would be?

A. This is the front wheel.

Q. No, I mean the motorcycle, sir.

A. I would say the motorcycle is on line with about the rear of the car, right here. (Witness indicating on diagram.)

Q. That is the front of the front of the motorcycle?

A. That would be the front of the motorcycle.

[281]

Q. You fired from that position, how many feet would you say it was from the car to the motorcycle this way?

A. To the side?

Q. Yes.

A. About from here to the attorney sitting here.

Q. It was at that point that you fired, is that correct, from that point?

A. From that point, yes.

Q. Now, how long —

THE COURT: (Interposing) You may be seated.

A. Now, Mr. Perry, are you referring now to the first shot or the second shot?

A. Both.

Q. Both shots?

A. Yes.

Q. Were fired from that position?

A. From about that position.

Q. I have asked you the distance from the car to the motorcycle along the side.

Now, I want to ask you, if I may, the distance from the front of the motorcycle to here where the [282] window was.

A. Which window?

THE COURT: The front.

Q. The front left.

THE COURT: Left front window, driver's side.

Q. What would that distance be in feet?

A. From about from here to the gentleman here, maybe eight feet.

Q. Eight feet?

A. Eight or ten feet, somewhere in that area, eight to ten feet.

Q. So essentially then Mr. Thurston was shot by you at a distance of eight to ten feet, is that correct?

A. Correct.

Q. Now, after the first shot — by the way, where were you when the first shot was fired in terms of the road?

Were you near the houses, do think?

A. No.

Q. You weren't?

A. No.

Q. It was before the houses, right?

[283]

A. Before the houses.

Q. Now, I want to invite your attention to the fact that a bullet was found going through a garage window of a private residence and lodging in an inside door of that house between the garage and the house.

Are you saying that you didn't fire your gun at that point?

A. That's correct.

Q. Somebody else must have?

MR. MULCAHY: I object, your Honor.

THE COURT: He may have the question. He has a right to answer the best he can.

THE WITNESS: I am saying it was not my bullet.

Q. It was not your bullet?

A. Correct.

Q. Did you hear any other shots fired as you were going along other than your own two shots?

A. No.

Q. And so far as you know, there were two shots fired — one came to rest in the brain of Mr. Thurston and the other shot, whether it was yours or not, [284] went into a house.

Now, your gun, however, showed it fired twice, right?

. . . . . .

[289]
know is he did swerve out.

Q You don't know as of this day whether his swerving there that occurred as you saw it, whether the swerving occurred as a result of looking out the window at you or whether it was intentional to try to hurt you — you don't know that now?

A In my opinion he deliberately swerved at me.

Q You would not consider at all the fact that a person who looks out the window at an officer overtaking him on a motorcycle, he turned his head, didn't he?

A Yes, he did look back at me.

Q At the time he swerved, right?

A He looked back, then he swerved — not separately.

Q In other words, he looked back then the swerve came?

A Sir, he looked back at me and then he swerved out at me.

Q You dropped back?

A Yes, I did.

Q Then it happened again?

A Yes, it did.

Q And you dropped back, right?

A That's correct.

Q So, two times you were able to just drop back, right?

[290]

A. That's correct.

Q. And by that time you had formed an opinion, I suppose, that Mr. Thurston was trying to hurt you?

A. That's correct.

Q. And you were getting angry, right?

A. I have no reason to get angry, sir.

[290]

Q. No reason to be upset?

A. I had no reason to get angry.

Q. You weren't angry?

A. No.

Q. It didn't upset you that you thought this man had swerved a couple of times and you had to drop back, it didn't upset you?

A. Sir, that didn't enter my mind.

Q. You were safe behind him, weren't you, riding to the left rear, you were safe?

A. To the left rear, no.

Q. Well, you dropped back, didn't you?

A. Once I dropped back I was safe.

Q. You had every opportunity to be safe, did you not?

A. That's correct.

Q. Is that right?

A. Yes.

[291]

Q. So you had every opportunity to avoid any threat to yourself, correct?

A. That's correct.

Q. And you had two opportunities to drop back and you did?

A. That's correct.

Q. You weren't annoyed at all by that?

A. I don't get annoyed on the job, sir.

Q. But at that time not being annoyed and having had the opportunity to keep yourself out of any perceived danger to yourself, not being upset, you tell us, you decided to kill him?

MR. MULCAHY: May that — I object to Mr. Gordon's editorial comments embraced in his questions, your Honor.

THE COURT: Are you objecting to the entire question?

MR. MULCAHY: Not the entire question. Just as —

MR. GORDON: (Interposing) I will rephrase it.

Q Not being upset and knowing that you had an opportunity to drop back, and having done it twice, and [292] gone to a position of safety for yourself, was it then at that moment that you decided to kill him?

A Sir, I cannot say that I would say yes, I decided to kill somebody.

Q What do you say?

A It was at that time, after the third time that he swerved to hit me that I fired my revolver.

Q As a warning shot?

A No.

Q You had done that before?

A I never fired a warning shot before.

Q Are you talking about your first shot now?

A You were talking about the third time when I fired the second round.

Q Let's go back to the first round.

Did the first round get fired after you dropped back the first time?

A The second time.

Q So after the second time you dropped back to safety, you dropped back twice, is that what you're telling us, then fired?

A All together, sir, he swerved three times.

Q So I would like to know at what point in time it was [293] that you decided to fire the first time?

A After the second time he swerved at me.

Q After the second time he swerved at you, you had been successful in dropping back, right?

A That's correct.

Q That was kind of easy for you to do as a skillful driver, wasn't it?

A That's correct.

Q You had no problem with your maneuverability on the motorcycle, you were in command of the motorcycle?

A That's correct.

Q So, the second time it happened you were in command of the motorcycle, you dropped back and then decided to shoot, right?

A The second time I dropped back.

Q You decided then to shoot?

A That's correct.

Q At that point you undid your revolver or had you done that before?

A I had undone the revolver before the second time of swerving.

Q In other words, one time after this man turned his head and the car swerved, after the one time [294] that the car, you tell us, swerved, you started to undo your revolver, correct?

A That's correct.

Q Was that for the purpose of using it?

A That's correct.

Q So just one time, one swerving and you decided to use your revolver, correct?

A If he swerved the second time.

Q So you said to yourself, in effect, if he does that to me one more time, I'm going to shoot him, is that what you said to yourself?

A That is not what I said to myself.

Q But that is what you did?

A I was prepared to shoot if he swerved the second time.

Q So you had it in your mind set that if he swerved the second time you would be prepared to shoot him?

A I would be prepared.

Q And you did shoot him?

A That's correct.

Q Whether you hit him the first time or the second time you don't know, or can you tell us your view on that?

[295] A I would say it was the second time.

Q So you fired, and after you fired, you didn't get the impression you hit him, is that it?

A That's correct.

Q Because he kept going?

A That's correct.

Q And so after you fired, did you drop back again?

A Yes, I did.

Q What was the purpose of that?

A I had dropped back each time after I fired because he had swerved at me.

Q You fired a second time you were prepared to fire if he did it a second time, and you did fire and then you fired and dropped back, right?

A Yes.

Q So your revolver is back in your hand, and your hand is on the accelerator again?

A That's correct.

Q Both at the same time?

A That's correct.

Q You're not wearing gloves?

A Yes, I was wearing gloves.

Q Did you take off your gloves before you fired?

[296] A No, I did not.

Q What kind of gloves are they, thin gloves?

A Yes, they are.

Q So you handle a gun as well as drive?

A That's correct.

Q Do you wear heavier gloves in the winter?

A In the wintertime, yes.

Q So having fired after the second time, you had your gun out, you were back in a safe position out of harm's way, is that correct?

A After the second time.

Q You fired, you dropped back, you were safe again, right?

A Until I accelerated back up to the car.

Q Then you accelerated back to the car, and by this time in your way of observing things, according to you, he has already done this twice to you, correct?

A Correct.

Q Is that right now?

A Yes.

Q So at that point having previously decided, sir, that after the first time if he did it again you would fire, now you're coming up to the third time [297] and this time you were equally certain if he did it again you would shoot?

A Well, it wasn't a matter of being equally certain. It was a matter of being prepared, sir.

Q Being prepared?

A Yes.

Q Now, when you were preparing to shoot, you knew at that moment, did you not, sir, that you possessed the ability to avoid that confrontation, you had the ability to avoid shooting him, you knew that, didn't you?

A Yes, I did.

Q You knew you could stay back — you knew you didn't have to accelerate — and you knew you didn't have to decide to shoot him, is that correct?

A That's correct.

Q But you then prepared, sir, to shoot him?

A I was prepared, sir.

Q Your gun was ready, it had five slugs in the revolver remaining, and you began to come up to a position close enough to be certain this time that you would hit him, correct, careful aim —

A (Interposing) Incorrect.

[298] Q Did you take careful aim?

A Incorrect, sir.

Q Well, did you aim at him?

A I did not come up any further to be certain that I could hit him. I came no further the third time than any of the rest of the times.

Q You came up to a position where you could hit him in any event?

A I came up to the same position that I was before.

Q And that is at short range —

A (Interposing) That is the position that you don't get hit by a car when he swerves over, you can't come up any further on a motorcycle.

Q In other words, you can come to a position where he couldn't swerve anymore?

A He could swerve over, but you would be able to drop back because if you are on a motorcycle you dare go up to the front of the car.

Q In that case, if he swerved, you were used to that maneuver and you certainly could have avoid —

A (Interposing) I never get used to people swerving at me.

Q The third time you came, do you say you went no [299] further than the diagram again?

A No further at any time other than when he stopped did I go any further than that.

Q But that was short range, don't you agree?

A The length of a car — yes, I do agree it is short range.

Q That is the range in which you can be pretty sure to hit the target?

A No, you can't be sure. You are on a motorcycle, and I never fired from a motorcycle before and you can't be sure.

Q Had you had any training in the course of your association with the Springfield Police Department about the use of a gun while riding on a motorcycle?

A No training.

Q And have you had any experience in the use of a gun while riding on a motorcycle?

A Nope.

Q Either privately or in the Police Department?

A No.

Q Have you ever done any target practice with a motorcycle?

A No.

[300] Q Were you aware of a regulation with respect to shooting from a moving vehicle?

A I am.

Q Were you aware of a regulation with respect to shooting at a moving vehicle?

A I am.

Q Were you aware on that day of the fact that in a thickly settled area that there are dangers in shooting from a moving vehicle at a moving vehicle, were you aware of that?

A Only in a thickly settled area.

Q Wasn't that thickly settled on the second shot?

A No.

Q You say that was not a thickly settled area?

A No, it was not.

Q How close are the houses there, if you recall?

A There were no houses there, sir.

Q When you fired the second shot, you're saying there was no houses there?

A That's correct.

Q Where you fired the first shot, there were no houses there?

A That's correct.

[301] Q You told us that you had no knowledge of that bullet that entered the house?

A That wasn't mine.

Q I think you told us that it was how many feet from the time the car came to rest that you think you pulled off your shot that hit him, how many feet?

A I would say this is somewhere close to a quarter of a mile from where I fired my last shot to where the car came to rest. (Witness indicating on diagram.)

Q Quarter of a mile?

A Almost.

Q So you're telling us that this man had a bullet in the brain and drove on the right side of the road for a quarter of a mile before he came to rest?

A You said that, I didn't. I did not say he had a bullet in his brain.

I said from where I fired my shot I say as to where he came to rest, I didn't say anything about a bullet in the brain.

Q Don't you agree, sir, that he had a bullet in the brain?

A According to Ballistics.

[302] Q You accept that?

A That is their report, I accept it.

Q Don't you agree it only takes a fraction of a second for a bullet to carry eight to ten feet from the muzzle to the victim, you agree with that, don't you?

A I agree.

Q That is only a fraction, that is a small part of time, and then you're saying that after the shot that hit him that this man drove his car on the right side of the road for a quarter of a mile?

MR. MULCAHY: I object, that is not the testimony. The motor vehicle continued on for a quarter of a mile.

THE COURT: I will sustain the objection.

Q As far as you are concerned, the motor vehicle continued for a quarter of a mile, right?

A That's correct.

Q It wasn't swerving anymore?

A No, he did not.

Q In fact, your observation here then is that after the man got shot through the brain he drove better than before?

[303] MR. MULCAHY: Your Honor, I object.

THE COURT: You're arguing with the witness. He didn't say that.

Q After the second shot, his driving got better?

MR. MULCAHY: I object.

THE COURT: Whether he drove it or whether the car continued without his doing anything to the wheel remains for the jury.

Q In other words, your observation — forget whether or not Mr. Thurston was driving — just what you saw of the car after the man was shot.

Your testimony is that the car went along for a quarter of a mile and it came to rest?

A That's correct.

Q And stayed on the right side of the road?

A That's correct.

Q Didn't wander off onto the grass or the left side, is that right?

A No, it did not.

Q And seemed to be operating straight?

A It did operate straight.

Q After a shot, as you say, a quarter of a mile down the road?

A That's correct.

. . . . . .

[345]

MR. MULCAHY: That is all I have, Officer.

THE COURT: Mr. Coyle, do you wish to cross examine?

MR. MULCAHY: Excuse me, may I just have maybe one final question, your Honor?

THE COURT: Yes.

Q (By Mr. Mulcahy) Could you estimate to the jury the entire period of time that elapsed from the time that you first picked up the chase of Mr. Thurston and from the time that you fired the second round, can you estimate the amount of time that had expired?

A I would say somewhere inside of a minute.

MR. MULCAHY: I have nothing further, thank you.

THE COURT: Mr. Coyle?

. . . . . .

[383]

A. I'm sorry, sir, I'm not allowed to answer questions about my military service.

Q. Thank you. So you entered the Springfield Police Department at age 30 in 1973?

A. Yes, sir.

Q. And had you received any training as an officer?

A. Yes, sir.

Q. Where?

A. In 1973, sir?

Q. After you got to be an officer.

A. I went to the police academy. I attended American International College.

Q. Now, in the police academy it is training given to all new officials, right?

A. Yes, sir.

Q. And where is that conducted?

A. In the police academy at the police station, 130 Pearl Street, sir.

Q. Conducted in a room of the police station?

A. Yes, sir.

Q. Now, in the course of your training in 1973, was it?

[384]

A. Yes, sir.

Q. Did you receive any training on the question of pursuit of a motor vehicle?

A. I don't recall.

Q. Anything special?

A. Anything special about that particular subject, sir?

Q. Were any guidelines given you as to how you stopped a fleeing vehicle?

A. There were guidelines given as to how not to stop a fleeing vehicle at that time.

Q. I see. Did you have any instruction as to shooting at fleeing vehicles?

A. No, sir, not at that time.

Q. And after 1973, up until September 28th of 1981, did you have any more training given by the City of Springfield's Police Department to you?

A. Yes, sir.

Q. And did any of that additional training go into the subject of pursuing vehicles and how to stop them?

A. Yes, sir.

Q. What was that?

[385]

A. Pursuing vehicles and how to stop them.

Q. What did you learn about that?

A. More how what not to do than what to do, sir.

Q. What did you learn not to do?

A. Not to set up a physical roadblock.

Q. In other words, not to place your body in the road?

A. No, sir. That wasn't. It was not to block the road with vehicles.

Q. Not to block the road with vehicles?

A. Yes, sir.

Q. You were told not to do that?

A. Yes, sir.

Q. Now, what were you told in terms of stopping your vehicle, how to do it; what did you learn about that in your teachings by the City of Springfield?

A. To use our lights and siren.

Q. Yes.

A. And to stand in the street and put your hand up to the vehicle to stop.

Q. And that's the extent of your training?

[386]

A. Yes, sir.

Q. Did your training go into the subject of a person who was stopping a vehicle driven by a person who was say agitated of in a domestic dispute with a wife or girlfriend, did you have any training when a person was agitated let's say, or upset emotionally?

A. We have no way of knowing the state of mind of an occupant of a vehicle. Our training would be to use caution under any circumstances.

Q. In other words, if you didn't know the state of mind of the person or the reason they weren't stopping, your training is to use caution?

A. We never know.

Q. You never know?

A. No. You can't know.

Q. Have you ever had experience where a person, where someone didn't stop for you?

A. Many times, sir.

Q. Many times?

A. Yes, sir.

Q. And did you ever use your gun to stop them?

A. No, sir.

MR. MULCAHY: I objection to that. [386] May that go out, your Honor? That has no relevance at all to this case.

THE COURT: He's answered the question. It may stand.

MR. MULCAHY: Move to strike.

THE COURT: Overruled. It may stand.

Q. (By MR. GORDON) Now, at some point, you were informed by radio transmission that there was a car that was being pursued by Officer Risch; did you know that?

A. Yes, sir.

Q. How did that come to you, over the radio?

A. Yes.

Q. Now, Officer Risch at that time was assigned to a bureau, wasn't he, called the Hit and Run Bureau?

A. Traffic Bureau. It was a special investigation for hit and run accidents.

Q. Did you see Officer Risch that day when he went on duty?

A. Yes, sir.

Q. And was he wearing a uniform?

A. No, sir.

. . . . . .

[396]

A. I would say he was going pretty fast; about that, 45, 50.

Q. Would you agree to a car coming over the hill it would be quite a surprise, unexpected to see a police car parked across the road?

MR. MULCAHY: I object.

THE COURT: You can't very well figure out what someone else may have thought.

MR. MULCAHY: I don't think it would be a surprise in this case. I object.

Q. (By MR. GORDON) In other words, the car, let me put it this way: To a person coming over the hill, they would have no way of seeing the police car until they got to the top of the hill, right?

MR. MULCAHY: Your Honor, I'm going to object. A person, I assume he's talking about this officer, this defendant being chased — Mr. Thurston. I don't mean defendant.

THE COURT: Mr. Thurston would have no way of seeing beyond the range of the hill, is that what you're saying?

MR. GORDON: Yes.

. . . . . .

[397]

Q. (BY MR. GORDON) Beyond the range of the hill, before he got to the top of the hill, your cruiser would not have been in sight, would it?

A. Right.

Q. So that there was some six or seven hundred feet for a driver such as Mr. Thurston to adjust to the fact that a cruiser was across the road, right?

A. Yes, sir.

Q. And he did, however, maneuver his car so as to avoid the cruiser, right?

A. That was my impression.

MR. MULCAHY: I object.

THE COURT: He's answered.

Q. (BY MR. GORDON) Did he avoid the cruiser?

A. Certainly did.

Q. He did?

A. Yes, sir.

Q. Now, in the time it took for him to go that what, how many hundred feet?

A. Six or seven hundred feet.

Q. Six or seven hundred feet at you say 45 or 50 miles an hour?

[398] A. Yes, sir.

Q. From the top of the hill?

A. Yes, sir.

Q. He could have also seen, could he not, that you had your gun drawn?

MR. MULCAHY: Objection.

MR. COYLE: Objection.

THE COURT: Sustained.

Q. (BY MR. GORDON) Did you have your gun drawn?

A. At some point as he — I drew my pistol as I was running into the extreme right lane and his vehicle continued to come in a path which would impact with me. That's why I drew my pistol.

Q. Well, did you draw your pistol when he was a hundred feet away, two hundred feet away, three hundred feet?

A. I could tell you more in the distance, in terms of the distance I was from the curbing than I could in terms of the distance he was from me. He was moving.

Q. You were watching his car, you were concerned about it?

. . . . . .

[407]

A. Yes, sir.

Q. Now, at that time, did you having placed your cruiser across the road, saw the car coming over the hill at what, 50 miles an hour, having no information that there was a weapon in the car, seeing no sign of distress on the part of the woman at that time, is it a fact that you thought of shooting the driver?

MR. MULCAHY: I object.

THE COURT: You may ask the question at what point in time did he pull his weapon and actually in fact use it.

Q. (By MR. GORDON) I want to ask you, sir, whether or not as you pulled your weapon out, you thought of shooting the driver?

A. The circumstance was such that I couldn't get a shot at him but I would have shot him if I had the opportunity. If I had a clear shot at him I would have shot.

Q. You would have shot at him and would have shot to kill?

A. Yes, sir.

Q. Now, what part of your training as [408] a police officer knowing the facts that you knew, caused you to think it was appropriate to take that man's life going 45 miles an hour in a car without any thought of a weapon, without any sign of distress on the part of the operator, without any accident on the highway, without any robbery, what part of your training taught you to think it appropriate to shoot to kill?

MR. MULCAHY: Objection to the form of the question, your Honor.

THE COURT: Well, he may have the question. As long as he put it to him in what he was thinking. Why did you think it was appropriate? Why would you have done so?

THE WITNESS: There are two questions that I perceive here. One, the facts available to me, which I haven't stated what facts were available to me yet, and what part of my training indicated I should morally or legally shoot.

. . . . . .

[412]

I had at that time according to the rules and regulations a subject who had committed a felony, and who had either committed serious assault on an individual, and was likely to do so if he got away. And I considered that as he approached me, that there was two lanes other than the blocked lane with the cruiser that he could have gone to, and he continued into the lane in which I was in, and my impression was that he was trying to kill me, and I was under the impression that he would kill anything or anyone that got in his path, and that whatever force was necessary at the time to stop that individual was appropriate, and at that time, I felt shooting him would be appropriate; yes, sir.

Q. (By MR. GORDON) That the explanation for your thinking you should shoot him, right?

A. Exactly, sir.

Q. And that would be something you could do without fear that you were going to be violating any

. . . . . .

[470]

Q. And you just told this jury that you had your hat on?

A. Well, I assume I had it on because I was in full uniform and it's part of the uniform when you exit the vehicle.

Q. But in fact you don't know whether you had it on or not?

A. I can't remember a hundred percent sure, no.

Q. In other words, you can't be sure?

A. That's what I said.

Q. All right. So to say that you had it on wouldn't be a fact that you know?

A. I'm assuming I had it on due to the uniform.

Q. So Mr. Thurston drove off without a word?

A. Well, I identified myself as a police officer, and asked him to shut off the engine and get out of the car.

Q. Yes.

A. At which time he drove through the red light.

Q. The red light hadn't changed yet?

[471]

A. No, sir.

Q. Did he see your uniform?

A. I don't know if he noticed it.

Q. You got right behind him?

A. Yes.

Q. And at some point you began to follow him?

A. That's correct, sir.

Q. You kept behind him?

A. Yes, sir

Q. I want to ask you about your training. You took a course at the room of the Springfield Police Department called the Police Academy?

A. Yes, sir.

Q. And did you get any training on stopping cars; how to do it?

A. Various training; yes, sir.

Q. What was your training?

A. Regards to what part of the stop?

Q. Stopping a car that won't stop for you?

A. Every circumstance is different. It depends on what might work in one circimstance may not work in a second circumstance.

Q. What were you planning to do?

[472]

A. At this particular time, I had the siren on and flashing headlights.

Q. Yes, sir.

A. And I had a portable magnetic blue light that goes on to the roof of the car which plugs into the cigarette lighter and I had put that on the roof, and all of those were working and I attempted to just stay with the subject and notify the station and to call for assistance.

Q. That's what you did?

A. Yes, sir.

Q. And you stayed with him?

A. Yes, sir.

Q. And you saw him drive by a partial roadblock?

A. Several.

Q. Two?

A. Yes.

Q. And then at some point you were on Roosevelt Avenue do you remember?

A. Yes, sir.

Q. And were behind the Thurston car?

A. That's correct.

[473]

A. That's correct.

Q. Now, would you be able to tell us the speed of that car as he went through the first point where there was a partial roadblock?

A. I believe that was Memorial Avenue, Memorial Drive up in the Industrial Park.

Q. Yes.

A. And as we approached the roadblock he was probably doing accelerated somewhere around 40, 45 miles an hour.

Q. He accelerated at that speed?

A. We had made a right hand turn off of Industry Avenue.

Q. He wasn't burning rubber going or anything?

A. You could hear squealing of the tires but it's not — the squealing is due to taking the speeds at a higher, taking a corner at higher speed than normal.

Q. You were following him at 40, 45?

A. As we approached that roadblock; that's correct.

Q. Was that at high speed?

. . . . . .

[510]

A. Correct.

Q. And one of the things that you do is to investigate the conduct of members of the department?

A. That is correct.

Q. Now, in connection with that, does it come to your attention as to what kind of training the members of the department get?

A. Well, they go through an academy and then they go through the rifle range and so forth.

Q. Now, in your period of time as a member of the force, were you given any specific instructions or training in connection with the pursuit of a vehicle?

A. I read it, I never went through the academy. The academy came after my days, and but we had periodic meetings and so forth with the guns and so forth but not just what we have in the rules and regulations.

Q. In other words, the rules and regulations are one part of the training, that is a person has [511] to know the rules and regulations?

. . . . . .

[532]

Q. (Interposing) Could you answer that question, did you hear?

A. I'm trying to explain that to you, sir.

Q. I just want to ask this question. The question is yes or no, did you hear? If you didn't say so.

A. I did not hear an impact.

Q. Now, so you didn't fire to protect yourself?

A. No, sir.

Q. And you didn't fire because of some situation you had heard about, you fired because you thought Daigneau had been hit?

A. That was the primary reason, sir.

Q. And you fired at the wheel or the tire?

A. I fired at the left rear tire, sir.

Q. Now, did you know where your bullet had gone?

A. At the instant I fired the car, I could have reached out, I could have reached into the car, that's how close I was to the car. As I stepped back, I was in the path of the car. I stepped back, and he went by.

[533]

Q. Yes.

A. As he started by Officer Daigneau, the last time that I knew exactly where he was, he was standing in the middle of the road, which would have been between the two headlights of the car that was being operated by Mr. Thurston.

Q. Yes.

A. Okay. As the car approached me, all right, and we had our hands up in the air kind of waving our hands, the cruiser was parked in the lane, the lights and the overhead lights were on. As he approached us, I'm not sure of the exact distance, but maybe from here to the jury box, maybe a little further, I drew my weapon.

As he came closer, he looked like he was going to hit me and I stepped back and as the car went by me, the left rear tire and wheel was with me, I fired one round.

Q. So it looked to you that he from the distance, from you to the jury box, that he was going to hit you?

A. He was coming right at us.

. . . . . .

[558]

A. Yes, sir.

Q. If you ejected the casing say with your fingernail at a time when you don't know, and on a place that you can't recall, would you in the normal course reload it?

A. Possibly.

Q. And on that evening, did you do that?

A. No, sir.

Q. Was there some reason why you didn't reload if you're taking out a spent cartridge and it's been lost now to ballistics, is there any reason why you didn't reload?

A. I don't remember taking out the spent cartridge.

Q. Now, you didn't see anybody get clubbed that night other than the flashlight incident with Risch, right?

A. No, sir.

Q. And you didn't see any clubs at the scene?

A. No, sir.

Q. And you didn't see Perry shoot anyone?

A. No, sir.

[559]

Q. And you didn't see any car swerving on the road left and right, did you?

A. He was coming at me, sir, I did.

Q. Well, I mean down by Roosevelt Avenue.

MR. MULCAHY: Well, excuse me. I object to the form of the question. Mr. Gordon asked the question and he responded. That was his answer. If he wants to ask him another question.

THE COURT: He's giving him another question, he has the right to an answer.

Q. (BY MR. GORDON) Do you know as you approached the place where the Thurston — may I approach the board, your Honor?

THE COURT: Yes.

Q. (BY MR. GORDON:) The Thurston car came to rest, did you see any swerving of motor vehicles down in this procession?

A. No, sir.

Q. With respect to the Mercury vehicle that you saw, Mr. Thurston's car, are you aware of in that model that the gas tank is to the rear?

A. No, sir, I'm not. I'm not familiar with that type of car at all.

. . . . . .

THE COURT: Madam Foreperson, members of the jury, now that you've heard the evidence and final arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

I urge you to pay close attention to these instructions as you will not be allowed to take a copy of them into the jury room.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the plaintiff Lois Thurston Kibbe, as Administratrix of the estate of Clinton Thurston and the answer thereto of the defendants, Theodore Perry, John Troy, Kenneth Schaub, and Eric Risch and the City of Springfield.

You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be guided by sympathy, prejudice or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, [916] follow the law as instructed by the Court, and arrive at a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations in life. The law is no respecter of persons; all persons stand equal before the law and are to be dealt with as equals in a court of justice.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors, and to arrive at a verdict by applying the same rules of law as given in the instructions of the Court.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

Counsel have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to [917] you between the law as stated by counsel, and that stated by the Court in these instructions, you of course are to be governed by these instructions. You are not to single out one instruction alone as stating the law, but consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it will be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court, just as it would be a violation of your sworn duty as judges of facts, to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

During the course of the trial, I may have occasionally asked questions of the witness in order to bring out facts not then fully covered in the [918] testimony. Do not assume that I hold any opinion on the matters to which my questions may have related. Remember at all times you as jurors are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

It is the duty of the attorneys on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible.

You should not show prejudice against an attorney or his client because the attorney has made objections. Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not unless expressly stated indicate any opinion, as to the weight or effect of such evi-

dence. You the jurors are the sole judges of the credibility of all witnesses, and the weight and effect of all evidence.

It is the duty of the Court to admonish an attorney who out of zeal for his own cause, doing something which is not in keeping with the rules of evidence or procedure. You are to draw no inferences against the side to whom an admonition of [919] the Court may have been addressed during the trial of this case.

Statements and arguments of counsel, both opening arguments and closing arguments are not evidence in the case. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must unless otherwise instructed accept the stipulation, and regard that fact as proof.

Any evidence as to which an object was sustained by the Court, and any evidence ordered stricken by the Court must be entirely disregarded.

The view you took on the first day of trial is evidence. However, anything else you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them, all exhibits received in evidence regardless of who may have produced them, and all facts which may have been admitted or stipulated.

In addition you may consider any [920] interrogatories and answers thereto read to you by counsel. I don't believe there were any in this case.

As the sole judges of the facts, you must determine which of the witnesses you believe, what portion of their testimony you accept, and what weight you attach to it. At times during the trial I may sustain objections to questions asked without permitting the witness to answer or where an answer has been made, may instruct it be stricken from the record and that you disregard it and dismiss it from your minds.

You may not draw any inference from an unanswered question nor may you speculate as to what a witness would have said if he had been permitted to answer the question. You may not consider testimony which has been stricken in reaching your decision. The law requires that the decision be made solely upon competent evidence that is before you. Such items as I exclude from your consideration will be excluded because they are not legally admissible.

The law does not, however, require you to [921] accept all of the evidence I shall admit even though it be competent. In determining what evidence you will accept you must make your own evaluation of the testimony given by each of the witnesses, and determine the degree of weight you choose to give to his testimony.

The testimony of a witness may fail to conform to the facts as they occurred, because he intentionally tells a falsehood or because he did not accurately see or hear that about which he testifies, or because his recollection of the event is faulty, or because he has not expressed himself clearly in giving his testimony.

There is no magical formula for which one may evaluate testimony. You bring with you to this courtroom all the experience and background of your lives. In your everyday affairs, you determine for yourselves the reliability or unreliability of statements made to you by others, the same test that you use in your deliberations.

You may be guided by the appearance and the conduct of the witness, or by the manner in which the witness testifies or by the character of [922] the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize the circumstances under which each witness is testifying and every matter in evidence which tends to show whether a witness is worthy of belief.

Consider each witness' intelligence, motive, and state of mind and demeanor and manner while on the stand.

Consider the witness' ability to observe the matters as to which he testified and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, the manner in which each witness may be affected by the verdict and the extent to which it would, if at all, each witness is either supported or contradicted by other evidence in the case.

An inconsistency or discrepancy in the testimony of a witness or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see, hear it differently. And innocent misrecollection, like [923] failure of memory, is not an uncommon experience.

In weighing the effect of discrepancy always consider whether it pertains to a matter of importance or unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

If it appears that there is a discrepancy in the evidence you will have to consider whether the apparent discrepancy may not be reconciled by fitting the two stories together. If, however, that is not possible, you will then have to determine which conflicting version you will accept.

You are not bound to decide any issue of fact in accordance with the number of witnesses one side or the other may have produced. The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witness and which evidence appeals to your mind as being most accurate, and otherwise trustworthy.

The testimony of a police officer is entitled to no special or exclusive sanctity. A police officer who takes the witness stand subjects [924] his testimony to the same examination and the same tests that any other witness does and in the case of police

officers, you should not believe them merely because they are police officers.

You should recall their demeanor on the stand, their manner of testifying, and the substance of their testimony, and you should weigh and balance it just as carefully as you would the testimony of any other witness. People employed by the government, including police officers, do not stand in any higher station in the community than other persons, and that testimony is not entitled to any greater weight.

You have heard in this case certain medical opinion testimony. The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call expert witnesses. Witnesses who by education and experience, have become expert in some art, science, profession or calling, may state opinions as to relevant and material matter in which they profess to be expert, and may also state their reasons for their opinions.

[925]

You should consider the expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide such opinion is not based upon sufficient study, investigation, knowledge or experience, or if you should conclude that the reasons given in support of the opinion are not sound, you may reject it entirely or give it such weight as you think it deserves.

Tape recordings of conversations were permitted into evidence and played for you. Transcripts of those recordings were furnished for your guidance and you listened to the tapes. The tapes, however, are evidence in the case and the transcripts are not evidence. If you perceive any variation between the recordings and the transcript, you must be guided solely by the tapes and not by the transcripts.

If you could not determine from the tape that particular words were spoken, you must disregard the transcripts insofar as those words are concerned.

During the trial of this case certain [926] testimony from an inquest has been read to you. The inquest serves as an aid in the achievement of justice by obtaining information as to whether a crime has been committed. However, the question before you, the jury, is whether Clinton Thurston's civil rights were violated. The inquest in no way reached an answer to this question.

You may, however, in deciding whether there has been a civil rights violation in this case, consider testimony from the inquest. Such testimony is entitled to the same consideration and is to be judged as to credibility and weighed, and otherwise considered by the jury insofar as possible, in the same way as if the witness had testified from the witness stand.

Remember that you the jurors are the sole judges of the credibility of the witnesses, and the weight their testimony deserves. After making your own judgment you will give the testimony of each witness such weight if any you think it may deserve.

Now the burden is on the plaintiff in a civil action such as this to prove every essential element of its claim by a preponderance of the [927] evidence. If the proof should fail to establish any essential element of the plaintiffs claim by a preponderance of the evidence in the case, the jury should find for the defendants.

To establish by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as when considered and compared with that opposed to it, has more convincing force and produces in your mind belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may unless otherwise instructed consider the testimony of all witnesses regardless of who may have called them, and all exhibits received in evidence regardless of who may have produced them.

In determining whether the plaintiff has proved her case against each defendant, you must consider the acts of each defendant separately.

Now the element of the case: The plaintiff Lois Kibbe is suing in two capacities. On the one hand plaintiff is suing on behalf of the deceased, Clinton Thurston. In this connection, the plaintiff has asserted that the defendant officers by their actions on September 28th, 1981, deprived the deceased of his civil rights.

All the officers deny these allegations. The plaintiff has also alleged that the failure of the City of Springfield to train and supervise the defendant officers in such a way that as to prevent this constitutional violation from occurring. The City denies that this occurred on the City's part.

In addition to a civil rights claim, plaintiff is also suing on behalf of certain dependents of Clinton Thurston. In this case, the plaintiff has sued the defendant, Theodore Perry, under Massachusetts' wrongful death statute which allows monetary recovery from anyone who negligently or recklessly causes the death of another person.

I will now discuss the plaintiff's claims. However, the fact that I am now instructing you on the theories of civil rights and wrongful death should not be interpreted by you as intimating that [929] the defendants did in fact commit the acts plaintiff alleges. You the jurors are the sole judges of whether the defendants' actions violated Clinton Thurston's civil rights and whether the defendant Perry is liable on a wrongful death theory.

On civil rights: The plaintiff Lois Kibbe charges the defendant officers with violation of Clinton Thurston's civil rights on September 28th, 1981.

Specifically, the plaintiff alleges that while the defendant officers were acting under the color of authority of the Commonwealth of Massachusetts as members of the Police Department of the City of Springfield, they knowingly deprived Clinton Thurston of his rights secured to him by the Constitution of the United States, not to be deprived of his life without due process of law.

The Fourteenth Amendment to the Constitution of the United States states that: No state shall deprive any person of life, liberty or property, without due process of law. Thus every United States citizen has the right to his or her life, and the right not to be deprived of that life [930] without due process of law.

The plaintiff has brought the action under Section 1983 of Title 42 of the United States Code, which is one of the civil rights statutes that Congress enacted to enable people to enforce the Fourteenth Amendment rights.

Section 1983 provides that any citizen may seek redress in this court by way of damages against any person or persons who, under color of state law or custom, subjects such citizens to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States.

In order to prove her claim therefore, the burden is upon the plaintiff to establish by a preponderance of the evidence in this case, each of the following elements: One, that the defendants' conduct towards Clinton Thurston violated his federal constitutional right not to be deprived of his life without due process of law as that phrase will be defined and explained in these instructions.

Two, that the defendants then and there acted under the color of authority of the [931] Commonwealth of Massachusetts, and three, that the defendants' acts were the proximate or legal cause of damages sustained by Clinton Thurston.

Acts are done under color of law of the state, not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without or beyond the bounds of the lawful authority.

You are instructed as a matter of law that actions taken by the defendants in their capacities as police officers of the City of Springfield, are actions taken under color of law of the Commonwealth of Massachusetts.

An injury or damage is proximately caused by an act or failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

The essence of plaintiff's claim is that Clinton Thurston was deprived of his life without [932] due process of law. To be deprived of one's life without due process of law means to be deprived of such right without authority of the law.

In other words, it means that one's life is taken in some manner by an official who has acted beyond the bounds of his lawful authority, as given to him by state law.

Before you can determine whether or not the defendants deprived Clinton Thurston of his life without due process of law, you must determine whether the defendants committed the acts alleged, and if so, whether the defendants acted under the circumstances within or without the bounds of their lawful authority under state law.

If the defendants acted within the bounds of their lawful authority under state law, then the defendants could not have deprived Clinton Thurston of any right without due process of

law, since the Court finds and instructs you that the state law applicable in this case meets the requirements of the federal Constitution.

Remember, determining whether the defendants deprived Clinton Thurston of his life [933] without due process of law, you must consider each defendant and his acts separately.

The plaintiff alleges that the defendants deprived Clinton Thurston of his life without due process of law by using excessive force on him. Every person has the constitutional right not to be subjected to unreasonable or excessive force while being arrested, or while in the custody of a law enforcement officer.

In making the lawful arrest, an officer has the right to use such force as is reasonable and necessary under the circumstances to effect the arrest. An arrested person has a duty to go with the police officer. If an offender resists, the officer may use such force as may be required under the circumstances to overcome the resistance. Whether or not the force used in making an arrest was reasonable or unreasonable, is an issue to be determined in light of all the surrounding circumstances.

The measure of reasonable force is that which an ordinarily prudent and intelligent person with the knowledge and in the situation of the [934] officer would deem necessary under all the circumstances.

In some circumstances, it is lawful for a police officer to use deadly force in effecting an arrest. Under the law of Massachusetts, a police officer is justified in using deadly force to prevent the escape of a fleeing felon, only if three conditions are present: One, the arrest is for a felony. Two, the officer reasonably believes the force employed created no substantial risk of injury to innocent persons.

Three, the officer reasonably believes that A, the crime for which the arrest is made involved conduct including the use or threatened use of deadly force, or B, that there is a substantial

risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

You are instructed that the crime of assault with a dangerous weapon, kidnapping, and attempted murder are felonies in the Commonwealth of Massachusetts. Whether Clinton Thurston was actually guilty of the offense which the defendant [935] officers tried to arrest him is not material to the issue of whether the officers used excessive force on him.

Now the claim against the City of Springfield. The plaintiff Lois Kibbe has brought her claim of a civil rights violation against not only the individual police officers, but also the City of Springfield. A governmental body such as the City of Springfield can be found to be responsible for violations of a person's rights, under Section 1983 of Title 42 of the United States Code.

The City of Springfield is the employer of police officers, but the City cannot be held liable merely because the police officers involved are its employees. An incident of excessive force on the part of the police officers standing by itself, is insufficient to find the City of Springfield liable under Section 1983. A governmental body can be found responsible for the deprivation of a person's civil rights if the actions taken by its employees, are in accordance with a custom or practice of the government and those actions caused the deprivation [936] of the person's rights.

The custom or practice may be an official policy of the City; however, the custom or practice does not have to be authorized by written law, nor must it be the result of formal approval through official decision-making channels. It is enough that the customs or practices are so permanent and well-established, as to demonstrate implicit authorization or approval or acquiescence in the unconstitutional conduct. Where a city's failure to train, supervise, or discipline police officers is reckless or grossly negligent, and this failure constitutes a custom or practice of the city, then the city may be held liable under Section 1983.

If you are convinced by a preponderance of the evidence that Clinton Thurston was deprived of his civil rights by the actions taken by the defendant police officers then you must decide if the actions taken were done in accordance with the custom or practice of the City of Springfield.

If you are convinced by a preponderance of the evidence that the officers acted in conformity with the City's custom or practice, and that this [937] custom or practice violated Clinton Thurston's civil rights; then you may find for the plaintiff and her claim against the City of Springfield. Obviously the reverse is true if you find this is not so, then you will find for the City in this claim.

If you should find for the plaintiff on her civil rights theory against any of the defendants, then you must decide the issue of damages. You should not interpret these instructions on the issue of damages as implying that you must award damages. These instructions are given only for your guidance.

You the jurors are the sole judges of whether and in what amount damages should be ordered to the plaintiff against any of the defendant officers and or the City of Springfield.

Actual damages: If you should find the plaintiff is entitled to a verdict on her civil rights claim, in arriving at the amount of this award, you should include the reasonable value not exceeding the actual cost to Clinton Thurston, of any medical care, services and supplies, as shown by the evidence in the case to have been reasonably [938] required and actually given in his treatment.

You may also include a sum that will reasonably compensate Clinton Thurston for the loss of his civil rights. The purpose of actual damages in a civil rights case is compensation. If you do not find Clinton Thurston sustained actual or compen-

satory damages, you may then award the plaintiff nominal damages as little as one dollar.

Punitive damages: In addition to actual damages, the law permits the jury under certain circumstances, to award the injured person punitive and exemplary damages in order to punish the wrongdoer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct. Punitive damages may be assessed only against the individual defendant police officers and not against the City of Springfield.

If you should find from a preponderance of the evidence in the case, that the plaintiff is entitled to a verdict for actual or compensatory damages, and should further find that the acts or omissions of the defendants which directly caused [939] actual injury or damage to Clinton Thurston were maliciously, wantonly, or oppressively done then you may if in the exercise of discretion, you unanimously choose to do so, add to the award of actual damages, such amount as you shall unanimously agree to be proper as punitive and exemplary damages.

You must decide that the defendants acted willfully, maliciously, or with reckless disregard of Clinton Thurston's constitutional rights, before you may award punitive damages.

An act or failure to act is maliciously done if prompted or accompanied by ill will, or spite, or grudge either toward the injured person individually, or toward all persons in one or more groups or categories in which the injured person is a member.

An act or failure to act is wantonly done if done in a reckless or careless disregard or indifference to, the rights of one or more persons, including the injured person.

Now, wrongful death. The plaintiff, Lois Kibbe, is also suing as a representative of certain of Clinton Thurston's dependents under the [940] Massachusetts wrongful death statute, Massachusetts General Laws Chapter 229, Section 2.

This statute provides that a person who by his negligence, or by his willful, wanton or reckless act causes the death of a person, shall be liable on damages. Plaintiff's wrongful death theory runs only against defendant Perry.

In order to prove negligence, the plaintiff must establish by a preponderance of the evidence three elements. One, a duty or obligation on the part of the defendant charged with negligence to use reasonable care to protect others. Two, a failure to discharge that duty, and three, an injury proximately caused by that failure.

In a negligence action, a defendant is deemed to have breached a duty of care owed when he fails, either by omission or action, to exercise that degree of care, vigilance and foresight, that a reasonable and prudent person would have exercised under the circumstances.

A defendant is liable for the injuries suffered by a plaintiff if a defendant is negligent, and his negligence proximately caused the injury. [941] Proximate cause is simply the legal cause of the injury and it is for you, the jury, to determine. It is that cause which in a continuous sequence, unbroken by any new cause, produces an event and without which the event would not have occurred.

It is Lois Kibbe's burden of proof by a preponderance of the evidence that the defendant Perry's breach of duty, was the direct and proximate cause of Clinton Thurston's death. The plaintiff must prove that but for the defendant Perry's wrongful conduct, Clinton Thurston's death would not have resulted.

In addition to negligence, the plaintiff also alleges willfull conduct on the part of the defendant Perry. To prevail in this theory, plaintiff must prove by a preponderance of the evidence, that the Defendant Perry by his willful, wanton, or reckless act, caused the death of Clinton Thurston.

An act is done willfully, if it is done voluntarily and with the intent to do something the law forbids; that is to say with bad purpose either to disobey or to disregard the law.
[942]

An act is done wantonly if done in a reckless or careless disregard of or indifference to the rights of one or more persons, including the injured person.

Now, damages for wrongful death. If you should find for the plaintiff against defendant Perry and the wrongful death theory, either by finding negligence, or reckless conduct, then you must decide the issue of damages. Again, you should not interpret these instructions on the issue of damages as implying that you must award damages.

These instructions are given only for your guidance. I am instructing you twice on damages because the damages which are recoverable for a civil rights violation are different from those recoverable under the Massachusetts wrongful death statute, as you shall see.

In arriving at an award for damages for wrongful death, you the jury should include one, the fair monetary value of the decedent to his spouse, children and next of kin, as shown by the evidence in the case, and including but not limited to, compensation for the loss of the reasonably expected [943] net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to those persons. And two, the reasonable funeral and burial expenses of the decedent.

In addition to actual damages, the Massachusetts wrongful death statute permits an award of punitive damages, in an amount of not less than five thousand dollars in such case as the decedent's death was caused by the malicious, willfull, or wanton, reckless conduct of the defendant or by the gross negligence of the defendant.

Finally, if you award damages to the plaintiff, the damages must be reasonable. You may award only such damages as will reasonably compensate for such injury and damage as you find from the preponderance of the evidence in the case, that was sustained as a proximate result of the defendants' conduct.

You are not permitted to award speculative damages, so you are not to include in any verdict, compensation for any prospective loss which, [944] although possible, is not reasonably certain to occur in the future.

You are not to award damage for any injuries or condition which the party may have suffered, or may now be suffering unless it has been established by a preponderance of the evidence in the case, that such injury or condition was proximately caused by the incident in question.

Summary: You are to consider the actions of each of the five named defendants separately, so you may return a verdict for the plaintiff against none, any one, any two, any three, any four or all five of the defendants.

In summary, you must determine the following issues: Did the defendants deprive Clinton Thurston of his life without due process of law on September 28th, 1981, and did the defendant Perry negligently or willfully cause Clinton Thurston's death?

If your unanimous answer to these questions is in favor of the defendants and against the plaintiff, you should return a verdict in favor of the defendants. But if your unanimous answer is [945] in favor of the plaintiff and against any of the defendants, then you should return a verdict in favor of the plaintiff, for such actual or compensatory damages that you find on a preponderance of the evidence in the case, were proximately caused by any act of the defendants you find responsible.

If you find for the plaintiff and award her actual or compensatory or nominal damages, you must decide whether it appears

by a preponderance of the evidence in the case that the acts and conduct of the defendants towards Clinton Thurston, at the time and place in question were maliciously or wantonly or oppressively done. And if so, what amount, if any, of punitive or exemplary damages should be added to the award of actual or compensatory or nominal damages.

You may award punitive or exemplary damages in addition to actual, compensatory, or nominal damages, or you may award actual, compensatory or nominal damages without punitive damages, all in accordance with the facts as you find and the Court's instructions. In all events, [946] your verdict must be unanimous.

You the voting members of the panel will be talking about this case for the first time amongst yourselves. Again I repeat, you are to consider each defendant separately.

I repeat the caution that after I have instructed you that nothing said in these instructions and no comment or question of the Court is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

Now, special verdict forms have been prepared for your convenience, and you will take these forms to the jury room. The answer to each question must be the unanimous answer of the jury.

Now, Madam Foreperson, you will write the unanimous answer of the jury in the space provided on the form as to each party, and will sign and date the appropriate forms when completed. I will go through these briefly with you. I'm taking them in the order in which I have them.

Question number one pertaining to Theodore [947] Perry. One, is the Defendant Theodore Perry liable for the death of Clinton Thurston, under the provisions of the Massachusetts wrongful death statute, Massachusetts General Laws Chapter

229, Section 2. The answer is a blank; either yes or no. And you'll fill it in after you have unanimously agreed upon it. If your answer is no, that ends this sheet.

You will then proceed to the next special verdict form. If your answer is yes, then the question is what amount of compensatory damages do you award to the plaintiff, and you put that in words, and in figures.

Then you go to question two, do you award punitive damages? And this again is either yes or no. You check off the applicable word as you find it to be. And if you say yes then if so, in what amount, and you put that in words and figures and sign your name as the foreperson.

Then special verdict form slip two, is the defendant Theodore Perry liable for the death of Clinton Thurston under the provisions of the civil rights statute, 42 United States Code, Section 1983. [948] You sign that yes or no as you unanimously find it to be; yes or no.

If your answer is no, then you proceed to the next special verdict form. But if your answer is yes, then you put what amount of compensatory damages do you award to the plaintiff, and you put that in words, and again in figures. And question two, do you award punitive damages, yes or no, and if it's no that's the end of that, but if it's yes then in what amount, in words, in figures, and you sign as the foreperson.

Then you go to the next three slips, which pertain to the individuals Kenneth Schaub, John Troy and Eric Risch respectively and the questions are the same as to each, and Schaub's slip is the same as Risch's and Troy's sheet.

Questions one, is the defendant Kenneth Schaub liable under the provisions of the civil rights statute, 42 United States Code, Section 1983, either yes or no. Unanimous. If your answer is no, then you proceed to the next special verdict form. But if your answer is yes, in what amount of compensatory damages do you award to the plaintiff. [949] And you put that figure in words.

Accordingly, in question two, do you award punitive damages, either yes or no. If your answer is no, that's the end of that but if the answer is yes, then if so, in what amount, and you put that in words and in figures, as you unanimously find it to be, and you sign it as the foreperson.

That same sheet will be individually complied with as to the case against John Troy, and as to Eric Risch.

Then the special verdict form as to the City of Springfield, is the Defendant City of Springfield liable for the death of Clinton Thurston under the provisions of the civil rights statute, 42 United States Code, Section 1983, either yes or no as you unanimously find it to be.

If your answer is no, that will be the end of your deliberations. If your answer is yes, then what amount of compensatory damages do you award to the plaintiff, and you put that figure in words and again in figures, you sign as the foreperson, and having completed your deliberations as to all cases, answer to the marshal that you're ready to return to [950] this Court with your slips.

Now you'll have with you the exhibits in this case, which includes the tape that has been played. If you wish to have the tape played you'll notify the marshal and he'll report back and he'll return with a tape recording, which I understand the recording set is here. The marshal will then play the tape for you.

You will not ask the marshal any questions, because he will be encouraged not to answer any. He'll play it for you, and he will return outside and you will continue your deliberations when he's out of the room.

(End of jury charge)

(Jury excused)

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
MAY 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1217.

In the Supreme Court of the United States.

OCTOBER TERM, 1985.

CITY OF SPRINGFIELD, MASSACHUSETTS,
PETITIONER,

v.

LOIS THURSTON KIBBE, ADMINISTRATRIX OF
THE ESTATE OF CLINTON THURSTON,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Petitioner.

RICHARD T. EGAN,
Counsel of Record,
City Solicitor,
HARRY P. CARROLL,
Deputy City Solicitor,
EDWARD M. PIKULA,
Assistant City Solicitor,
SUSAN J. MCFARLIN,
Staff Attorney,
DAVID G. SOUTHCOTTE, Clerk,
Law Department,
City of Springfield,
36 Court Street,
Springfield, Massachusetts 01103.
(413) 787-6085

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

1. Whether inadequate training of police officers is a viable theory of municipal liability under 42 U.S.C. § 1983.

2. Whether the "single incident" rule of *City of Oklahoma City* v. *Tuttle*, . U.S. , 105 S.Ct. 2427 (1985), is limited in application to one act by one officer.

3. Whether a policy of inadequate training may be inferred from the conduct of several police officers during a single incident absent evidence of prior misconduct in the department or a conscious decision by policymakers.

Table of Contents.

Opinion below 1

Jurisdiction 1

Statutory provision 2

Statement of the case 2

Summary of argument 6

Argument 8

I. Inadequate training of police officers is not a viable theory of municipal liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) 8

A. A policy not in and of itself unconstitutional, such as inadequate training, cannot be the basis of a municipal policy under *Monell* 9

1. Supreme Court decisions implicitly require an unconstitutional policy for § 1983 municipal liability 10

2. Lower court decisions reveal the problems associated with § 1983 municipal liability for policies which are not unconstitutional 13

B. Gross negligence is insufficient to establish a municipal policy 15

1. Conscious choice or deliberate conduct is required to establish a municipal policy 15

2. More than gross negligence is required under the Fourteenth Amendment's due process clause 18

II. The "Single Incident" rule of *City of Oklahoma City* v. *Tuttle*, 105 S.Ct. 2427 (1985), is not limited in application to one act by one officer 20

A. Without evidence of a prior pattern, the inference of a "policy" of inadequate training is unwarranted 21

B. The inference of causation was unwarranted without evidence of specific deficiencies in the city's police training 23

III. A policy of inadequate training may not be inferred from the conduct of several police officers during a single incident absent evidence of prior misconduct in the depatment or a conscious decision by policymakers 26

Conclusion 32

Addendum 33

Table of Authorities Cited

CASES.

Allee v. Medrano, 416 U.S. 802 (1974) 10, 17

Altman v. Aronson, 231 Mass. 588 (1919) 17n

Arlington Hts v. Met. Hous. Dev. Corp., 429 U.S. 252 (1977) 18

Baker v. McCollan, 443 U.S. 137 (1979) 19

City of Los Angeles v. Heller, U.S. S.Ct. Slip opinion No. 85-531, decided April 21, 1986 22

City of Newport v. Facts Concerts Inc., 453 U.S. 247 (1981) 11, 17

City of Oklahoma City v. Tuttle, ___ U.S. ___, 105 S.Ct. 2427 (1985) *passim*

Commonwealth v. Klein, 372 Mass. 823, 363 N.E. 2d 1313 (1977) 29n

Daniels v. Williams, 54 U.S.L.W. 4090 (1986) 19

Estelle v. Gamble, 545 F.2d 653 (5th Cir. 1977) 15

Estelle v. Gamble, 429 U.S. 97 (1976) 14, 15, 18

Gilmere v. City of Atlanta Ga., 737 F.2d 894, reh. en banc, 774 F.2d 1495 (11th Cir. 1985) 13, 22

Grandstaff v. Borger, Tex., 767 F.2d 161 (5th Cir. (1985), reh. denied en banc, 779 F.2d 1129 (1986) 13

Hague v. CIO, 307 U.S. 496 (1939) 10, 17

Hays v. Jefferson County, 668 F.2d 869 (6th Cir. 1982) 13

Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981) 13, 21

Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194 (1984) 20

Hughes v. Blankenship, 612 F.2d 403 (4th Cir. 1981) 22

Ingraham v. Wright, 430 U.S. 651 (1977) 20

Jensen v. Conrad, 570 F. Supp. 114 (D.C. S.C. 1983) 14n

Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied sub nom, John v. Johnson, 414 U.S. 1033 (1973) 19, 20

Julian v. Randazzo, 380 Mass. 391, 403 N.E. 2d 931 (1980) 29n

Keyes v. School District No. 1, 413 U.S. 189 (1973) 17, 21

Kibbe v. Springfield, 777 F.2d 801 (1st Cir. 1985) *passim*

Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983) 21

Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) 11n

Leite v. City of Providence, 463 F.Supp. 585 (D.R.I. 1978) 13, 14, 15

Martinez v. California, 444 U.S. 277 (1980) 13n

McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979) 22

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) *passim*

Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856) 19

Nye & Nissen v. United States, 336 U.S. 613 (1949) 21

Owen v. City of Independence, 445 U.S. 622 (1980) 11, 17

Owens v. Haas, 601 F.2d 1242 (2d Cir), cert. denied, 444 U.S. 980 (1979) 13, 22

Parrat v. Taylor, 451 U.S. 527 (1981) 19

Pembaur v. City of Cincinnati, 54 U.S.L.W. 4289 (1986) 11, 14, 16, 17, 18

Polk County v. Dodson, 454 U.S. 312 (1981) 11

Rizzo v. Goode, 423 U.S. 362 (1976) 10, 11, 17, 19, 22n
Rochin v. California, 342 U.S. 165 (1952) 19
Roman v. Richmond, 570 F. Supp. 1544 (N.D. Ca. 1983) 21
Smith v. Wade, 461 U.S. 30 (1983) 17n
Stebbins v. Police Comm. of Springfield, 196 Mass. 365 (1907) 18n
Tennessee v. Garner, ___ U.S. ___, 105 S.Ct. 1694 (1985) 11, 29n
Vippolis v. Village of Haverstraw, 768 F.2d 40 (2d Cir. 1985) 24
Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985), cert. denied, 106 S.Ct. 879 (1986) 13, 25
Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983) 21
Whitley v. Albers, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986) 14, 19
Youngberg v. Romero, 457 U.S. 307 (1982) 25

STATUTES.

United States Constitution
First Amendment 17
Eighth Amendment 14, 19
Fourteenth Amendment (Due Process Clause) 7, 15, 18, 19
28 U.S.C. § 1254 (1) 1
42 U.S.C. § 1983 *passim*
Massachusetts General Laws
Chapter 41, § 96B 24n
Chapter 209A, §§ 3, 6 2
Massachusetts General Laws Annotated
Chapter 258, § 2 20n
1902 Mass. Acts c. 134, § 1 18n
1909 Mass. Acts c. 244, § 2 18n

MISCELLANEOUS

2 J. Wigmore, Evidence 200 (2d ed. 1940) 21
American Law Institute, Model Penal Code § 3.07 (2) (b) (1962) 29n
International Association of Chiefs of Police, A Manual of Model Police Traffic Services Policies and Procedures (1986) 27n
C. McCormick, Evidence 329 (1954) 21
McQuillin Mun. Corp. § 12.126 (3d ed.) 15, 16
National Advisory Commission on Criminal Justice Standards and Goals, Report on Police (1973) 24n
Prosser & Keeton, Law of Torts (5th ed. 1984) 12, 17n
Webster's New International Dictionary (Springfield, Mass. 3d ed. 1981) 16n

No. 85-1217.

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

CITY OF SPRINGFIELD, MASSACHUSETTS,
PETITIONER,

v.

LOIS THURSTON KIBBE, ADMINISTRATRIX OF
THE ESTATE OF CLINTON THURSTON,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Petitioner.

Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit appears in 777 F.2d 801 (1st Cir. 1985). The judgment, memorandum and order rendered by the District Court for the Western District of Massachusetts on the motions for judgment notwithstanding the verdict are included in the appendix hereto.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on November 27, 1985. The petition for certiorari was filed on January 17, 1986 and was granted on March 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provision.

42 U.S.C. § 1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case.

The City of Springfield (hereinafter referred to as "City") is a municipal corporation located in Hampden County, Massachusetts. Theodore Perry, a City police officer, shot and killed Clinton Thurston during an automobile chase through the City.

At approximately 6:30 P.M. on September 29, 1981, the City Police Department received an emergency call from Dorothy Gilbert, who reported a violaton of a restraining order. The restraining order was issued under Mass. Gen. Laws c. 209A, §§ 3, 6, to protect Pamela Etter from abuse by Clinton Thurston. A cruiser was dispatched to investigate. Ms. Gilbert called the police a second time and stated that Thurston had threatened the occupants of her apartment with a knife. A second cruiser was sent to investigate. At about 8:15 P.M., a third telephone call was received stating that Thurston was breaking down the door. The dispatcher sent police to the scene once again. Within two minutes of that call, a fourth telephone call reported that Thurston was assaulting Ms. Etter at that very minute.

Police responding to the final call discovered that Thurston had abducted Ms. Etter, forcing her to leave the premises with

him in his '71 Mercury. Shortly thereafter, City Police Officer Risch spotted the Thurston vehicle. Risch activated the flashing headlights, portable blue light and siren of his unmarked cruiser, and initiated pursuit.

Thurston stopped at an intersection. Risch approached him and identified himself as a police officer. Thurston drove off from the curb, through a red light, and into the path of oncoming traffic.

Risch, joined by other cruisers, continued to pursue Thurston, frequently reporting his location and speed, which ranged between 40-45 m.p.h. As the chase continued, City Police Officers Troy, Kupras and Daigneau attempted to set up an intercept point at an intersection within the probable route of the Thurston vehicle.

As Thurston approached the three officers, he accelerated towards Officers Daigneau and Troy. Thurston narrowly missed Troy, who fired his weapon at the rear tire of the vehicle as it passed him, hitting the rim of the wheel. Risch reported Thurston's attempt to run down a police officer over his radio.

At the next intersection, Officers Schaub and Perry stationed themselves for a second attempt to intercept Thurston. Schaub's vehicle was placed across the right lane. Schaub stood in the middle lane attempting to flag down Thurston. The left lane was open. Thurston swerved his vehicle at Schaub, who ran out of its path to avoid being hit. Schaub drew his revolver and fired at the fleeing Thurston vehicle.

Captain Spellacy at Police Headquarters radioed instructions that motorcycles should stay out of the pursuit. Officer Perry did not hear these instructions. Perry observed Thurston's action at this intersection and joined the pursuit on his motorcycle, along with several officers in cruisers. Perry accelerated his motorcycle past the cruisers and pulled up to the left rear of Thurston's vehicle three times in an attempt to direct Thurston to halt. Each time Perry pulled up, Thurston swerved his car into Perry's path of travel in an attempt to knock Perry off his motorcycle. Perry fired his weapon twice, first after the second swerve by Thurston, and a second time after the third swerve. One shot, apparently the second, hit Thurston in the

back of the head, at which point the vehicle slowed down and eventually stopped. Perry testified that his participation in pursuit from the intersection to the car stopping was less than 60 seconds.

At this time, no one realized Thurston had been shot and most probably was unconscious. Thurston's hands remained on the wheel and he faced straight ahead in a seated upright position. Risch exited his vehicle, approached Thurston and ordered him out of the car. In apparent response, Thurston's vehicle lurched forward striking the cruiser blocking its path, whereupon Officer Risch struck Thurston in the back of the head with his flashlight. Simultaneously, Risch and other police officers pulled Thurston from his vehicle and handcuffed him facedown in the road.

Sargeant Thomas Rondeau, observing blood coming from Thurston's head, ordered Officer Reigner to transport Thurston to the hospital. Thurston was taken from the scene immediately and arrived at the hospital within 5-6 minutes. After some initial confusion, hospital personnel determined that Thurston had been shot. Thurston died at 9:24 P.M.

Officers Troy, Schaub and Perry, the three officers who had fired shots during the incident, submitted their revolvers to their superior officer. Ballistic reports indicated that the bullet which struck Thurston had come from Officer Perry's weapon.

On August 10, 1982, plaintiff, in her capacity as Administratrix of Thurston's estate, filed this action against ten City police officers and the City, alleging negligent or intentional deprivation of civil rights by the individual officers and negligent training or supervision by the City. At trial, plaintiff voluntarily dismissed claims against all defendants with the exception of the City and officers Perry, Schaub, Troy and Risch. At the close of plaintiff's case, motions for directed verdicts were denied. The City did not present any evidence.

The jury returned a verdict for plaintiff on the civil rights claim against Perry, awarding One Dollar ($1.00) in compensatory damages and Five Hundred Dollars ($500.00) in punitive damages. On the civil rights claim against the City, the jury awarded compensatory damages in the amount of Fifty Thousand

Dollars ($50,000). The jury found for defendants on all other claims. By special verdicts, the jury specifically found that Schaub, Troy and Risch had not violated Thurston's civil rights.

Judgment was entered in accordance with these verdicts on November 23, 1984. The City and Perry filed motions for judgment notwithstanding the verdict on November 29, 1984, to which plaintiff submitted an opposition. After hearing, the trial court denied both motions and ordered new trials on the grounds of inconsistent verdicts.

Upon plaintiff's motion, after hearing, the judge reconsidered his previous order and reinstated the judgment on the original verdicts. Both defendants filed separate notices of appeal on January 19, 1985 and the appeals were consolidated. Subsequently, Perry withdrew his appeal.

The First Circuit Court of Appeals addressed the following issues: whether inadequate training could ever meet the standards of municipal liability under *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978); whether the event in question was a "single incident" under *City of Oklahoma City* v. *Tuttle*, ___ U.S. ___, 105 S.Ct. 2427 (1985), thereby proscribing liability; whether a "policy" of inadequate training may be inferred from the conduct of several police officers absent evidence of prior misconduct or decisions by policymakers; and whether the jury instructions properly articulated the burden on plaintiff to establish municipal liability.

The First Circuit approved imposition of liability on the basis of a policy of inadequate training, stating:

> Four members of the Supreme Court recently have raised doubts as to whether a harm allegedly caused by a policy of gross negligence in police training could meet § 1983's standard of causation. *Tuttle*, 105 S.Ct. at 2436 n.7. We, however, continue to believe this is a viable theory of municipal liability because we conclude that it is possible to show "an affirmative link", *Tuttle*, 105 S.Ct. at 2436, between

a policy of inadequate training and resort to harmful police methods.

777 F.2d at 804.

The First Circuit, in "an admittedly close case," *id*. at 804, found that this was not a single incident because it "involved many officers and a series of exchanges between police officers and civilians," thereby distinguishing *Tuttle*. *Id*. at 806.

Although describing evidence on the City's training practices as "sparse," the First Circuit said that the jury could infer from the evidence before it "that it was the department's gross negligence in training that caused the premature use of deadly force against Thurston." *Id*. at 808-809.

Finally, the Court of Appeals found that ". . . while the district court's instructions could have been better, they were not defective . . ." because they did not allow "liability based solely on the incident in which Thurston was harmed . . ." *Id*. at 810.

Summary of Argument.

I. A policy of inadequate training of police officers cannot meet the policy requirement of *Monell*. A city should not be held liable under § 1983 for having a constitutional policy. An express requirement of an unconstitutional policy maintains the fault-based analysis of municipal liability articulated in previous decisions of this Court. Lower courts have expanded municipal liability beyond the limitations of *Monell* (pp. 8-15).

Gross negligence is insufficient to establish municipal liability under § 1983. The essential element of an "official policy" is conscious choice or deliberate conduct on the part of a policymaker. Gross negligence does not involve conscious choice or deliberate conduct (pp. 15-18).

More than gross negligence is required under the Fourteenth Amendment's Due Process Clause. Conscious choice or deliberate conduct is required for § 1983 municipal liability under "substantive" and "procedural" due process. Requiring a conscious choice or deliberate action on the part of a policymaker provides a clear basis for determining municipal liability under § 1983 (pp. 18-20).

II. The inferences prohibited by *Tuttle* are not limited to cases where only one officer and one shot are involved. The inferences are also improper when drawn from a single incident as in this case. Without evidence of a prior pattern, the inference of a "policy" of inadequate training is unwarranted. No "pattern" exists from which an inference of "knowledge" can be drawn. The jury found only one constitutional violation. The dissection of this single incident to create a pattern is unsound. This incident occurred in a very short period of time. There is no proof that City policymakers ignored a situation which would lead to a constitutional violation. Perry's decision to shoot Thurston was not a decision of the City. Fault was inferred without proof of a decision by a policy maker. The First Circuit inferred the City's training was inadequate and caused Perry to shoot Thurston. This inference lowers the standard of proof required by *Tuttle*. Without evidence of specific deficiencies in police training, the inference that training caused Perry to shoot Thurston cannot be drawn (pp. 20-25).

III. The First Circuit created inferences of fault and causation from "sparse evidence" summarized in six factors. A review of each factor reveals the absence of an evidentary foundation for § 1983 municipal liability. The First Circuit's suggested tactics are dangerous and appropriate only when the use of deadly force is authorized. This is not an alternative to the use of deadly force. If the officers knew Thurston would stop and shot anyway, that is murder not gross negligence in training. The officers' arguable violations of department rules do not avoid the single incident rule enunciated in *Tuttle*. Even if each shot constitutes a separate incident, there would be no

affirmative link to policymakers. The six factors do not support inferences of fault and causation necessary to hold the City liable under § 1983. The City is being held liable because Perry shot Thurston (pp. 26-32).

Argument.

I. INADEQUATE TRAINING OF POLICE OFFICERS IS NOT A VIABLE THEORY OF MUNICIPAL LIABILITY UNDER *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978).

A plurality of this Court in *City of Oklahoma City* v. *Tuttle*, ____ U.S. ____, 105 S.Ct. 2427 (1985), raised doubts as to whether inadequate training of police officers can meet the policy requirement of *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978).

> We express no opinion on whether a policy that itself is not unconstitutional, such as the general "inadequate training" alleged here, can ever meet the "policy" requirement of *Monell*. In addition, even assuming that such a "policy" would suffice, it is open to question whether a policymaker's "gross negligence" in establishing police practices could establish "policy" that constitutes a "moving force" behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policy maker would be required. *Tuttle*, 105 S.Ct. at 2436 n.7.

The First Circuit approved liability on the basis of a policy of inadequate training, stating:

> We . . . continue to believe this is a viable theory of municipal liability because we conclude that it is possible to show "an affirmative link," *Tuttle*, 105 S.Ct. at 2436, between a policy of inadequate training and resort to harmful police methods. 777 F.2d at 804.

Based on this reasoning the First Circuit affirmed liability on a gross negligence standard by approving the following jury instruction. "Where a city's failure to train, supervise, or discipline police officers is reckless or grossly negligent, and this failure constitutes a custom or practice of the city, then the city may be held liable under Section 1983." 777 F.2d at 810.

The questions reserved in *Tuttle* are presented for review in this case. Each will be discussed separately.

A. *A Policy Not In and Of Itself Unconstitutional, Such as Inadequate Training, Cannot Be the Basis of a Municipal Policy under* Monell.

It is well settled in 42 U.S.C. § 1983 actions, that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691.

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose acts or edicts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. *Id.* at 694.

The policy in *Monell* violated the constitution.[1] In *Monell* a municipal department had an official policy compelling pregnant employees to take unpaid leaves of absence before such leaves were medically required. 436 U.S. at 661.

As noted in the next section of the brief, the decisions of this Court implicitly require an unconstitutional policy as a precondition to § 1983 municipal liability.

1. Supreme Court Decisions Implicitly Require an Unconstitutional Policy for § 1983 Municipal Liability.

Before *Monell* this Court implicitly required an unconstitutional policy for § 1983 liability. In *Rizzo* v. *Goode*, 423 U.S. 362, 377 (1976), this Court declined to grant equitable relief under § 1983 where the official's actions had not violated the Constitution "under the well established rule that 'federal judicial powers may be exercised only on the basis of a constitutional violation.'" *Id.* at 377. *Rizzo* distinguished *Allee* v. *Medrano*, 416 U.S. 802 (1974) and *Hague* v. *CIO*, 307 U.S. 496 (1939). *Rizzo, supra* at 374-375. In *Allee* v. *Medrano*, "law enforcement authorities sought to suppress appellees' constitutional rights and exercised their authority under valid laws in an *unconstitutional* manner." 423 U.S. at 374, citing 416 U.S. at 812 (emphasis added). Similarly, in *Hague* v. *CIO*, as discussed in *Rizzo*, the mayor and the chief of police had adopted a policy:

> of excluding and removing the plaintiff's labor organizers and forbidding peaceful communication of their views to the citizens of Jersey City. These policies were implemented "by the force and violence" on the part of the individual policeman. There was no mistaking that the defendants proposed to continue their *unconstitutional policies* against the

[1] No unconstitutional policy was at issue in this case. The City's "official policy" regarding the use of deadly force is Constitutional. See n.18 *infra*.

> members of the discrete group. *Rizzo, supra* at 374 (emphasis added).[2]

After *Monell* an unconstitutional policy was present in all cases where this Court permitted municipal liability under 42 U.S.C. § 1983. *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (termination of employment without Due Process); *City of Newport* v. *Facts Concerts Inc.*, 453 U.S. 247 (1981) (cancellation of a music promoters license in violation of the First Amendment); *Tennessee* v. *Garner*, ____ U.S. ____, 105 S.Ct. 1694 (1985) (allowing use of deadly force to stop non-dangerous fleeing felons); *Pembaur* v. *City of Cincinnati*, 54 U.S.L.W. 4289 (1986) (unconstitutional policy of serving warrants). This requirement of an unconstitutional policy was restated with respect to a claim for damages and equitable relief, in *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981), where the court held that "a policy of withdrawal from frivolous cases would not violate the constitution." (*dictum*) *Id.* In *Tuttle*, a plurality of the Court noted:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, *unconstitutional* municipal policy, which policy can be attributed to a municipal policy maker. Otherwise *the existence of the unconstitutional policy*, and its origin, must be separately proved. *Tuttle*, 105 S.Ct. at 2436 (emphasis added).

[2] In a footnote the Court also distinguished *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966), which enjoined a "plan" which was unconstitutional stating: "The 'effectuation of a plan conceived by high ranking [police] officials,' a practice which in the interim the defendant had 'renounced only obliquely, if at all,' and as to which 'the danger of repetition has not been removed.'" 423 U.S. at 373, n.8 citing *Lankford*, 364 F.2d at 202, 204.

When an unconstitutional policy existed, § 1983 municipal liability was permitted. Conversely, when no unconstitutional policy existed, § 1983 municipal liability was rejected. An express requirement of an unconstitutional policy maintains the fault-based analysis of municipal liability articulated in previous decisions of this Court. Events have infinite causes:

> In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation." As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Prosser & Keeton on Law of Torts § 41 at 264 (5th ed. 1984).

A city should not be held liable under § 1983 for having a constitutional policy. When a municipal employee acts pursuant to an unconstitutional policy and a constitutional deprivation results, the moving force of the deprivation is the unconstitutional policy. The City's own action is at fault. On the other hand, when a municipal employee acts pursuant to a *constitutional* policy and a deprivation results, the moving force of the deprivation is unknown. "The fact that a municipal 'policy' might lead to 'police misconduct' is hardly sufficient to satisfy *Monell's* requirement that the particular policy be the 'moving force' behind a *constitutional* violation." *Tuttle*, 105 S.Ct. 2436-2437, n.8 (emphasis in original). Although the harm may be attributable to the City, "it is equally likely that the misbehavior was attributable to numerous other factors

for which the city may not be responsible . . ." *Id.* at 2440 (Brennan concurrence).[3]

The express requirement of an unconstitutional training policy before imposing § 1983 municipal liability will assist lower courts in deciding summary judgment and dismissal motions. It will provide clear guidance for litigants and allow municipalities to reasonably evaluate their exposure to § 1983 liability. It will prevent a determination of liability based solely on the perceived deep pocket of the municipal taxpayer.

2. *Lower Court Decisions* Reveal the Problems Associated With § 1983 Municipal Liability for Policies Which Are Not Unconstitutional.

After *Monell*, the first lower court decision permitting § 1983 municipal liability for damages without the establishment of an unconstitutional policy was *Leite* v. *City of Providence*, 463 F.Supp. 585 (D.R.I. 1978). *Leite* spawned a series of lower court cases alleging § 1983 municipal liability on the basis of supervisory action without an unconstitutional municipal policy. Compare *Owens* v. *Haas*, 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); *Herrera* v. *Valentine*, 653 F.2d 1220 (8th Cir. 1981); *Hays* v. *Jefferson County*, 668 F.2d 869 (6th Cir. 1982) and *Voutour* v. *Vitale*, 761 F.2d 812 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 879 (1986); with *Gilmere* v. *City of Atlanta Ga.*, 737 F.2d 894, 903-905, *reh. en banc*, 774 F.2d 1495 (11th Cir. 1985) and *Grandstaff* v. *Borger, Tex.*, 767 F.2d 161, 169 (5th Cir. 1985), *reh. denied en banc*, 779 F.2d 1129 (1986). *Leite* alleged Providence "was negligent in hiring, training, continuing to employ and/or failing to discipline and/or supervise its employees . . ." *Leite*, *supra* at 588. The district court, although dismissing

[3] Where the consequences of state action are too remote from the harm alleged, no liability attaches under § 1983. *Martinez* v. *California*, 444 U.S. 277, 285 (1980) (decision of parole board to release parolee insufficient to impose liability to estate of victim of murder by parolee five months after release).

the complaint, stated that if amended to allege gross negligence or deliberate indifference[4] in training, the complaint would be adequate under *Monell*. *Id*. at 591.

The *Leite* decision erroneously equated municipal liability with supervisory liability. *Id*. at 589. However mere participation by a supervisory official is not enough, even if the supervisor is a policymaker. As Justice Brennan stated in his opinion in *Pembaur*:

> The fact that a particular official — even a policymaking official — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. . . . The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. 54 U.S.L.W. at 4293 (1986).

The *Leite* opinion also adopted a standard from *Estelle* v. *Gamble*, 429 U.S. 97 (1976). *Estelle* was an Eighth Amendment case and therefore inapplicable to *Leite*, a due process case involving acts which occurred prior to an adjudication of guilt. Moreover, a split second decision by a prison officer in a hazardous situation does not violate the Eighth Amendment or substantive due process unless it is wanton misconduct. *Whitley* v. *Albers*, 106 S.Ct. 1078, 89 L.Ed.2d 251, 266 (1986).

---

[4] Equating gross negligence to deliberate indifference confuses the commonly understood meaning of these phrases. *Jensen* v. *Conrad*, 570 F.Supp. 114 (D.C. S.C. 1983). See n.6, *infra*. Amicus suggests a higher standard than gross negligence. See Amicus Part I. Requiring conscious choice or deliberate conduct to establish a municipal policy draws a clearer line. See *infra*, pp. 15-20.

Finally, *Leite* should not have used *Estelle* as precedent for imposing supervisory liability. *Estelle* established a standard of liability for physicians, guards and other persons deliberately indifferent to a prisoner's serious medical needs, not a standard for supervisory liability. *Estelle*, *supra* at 104. On remand, the Fifth Circuit dismissed the complaint against the supervisory defendants. *Estelle* v. *Gamble*, 545 F.2d 653, 654 (5th Cir. 1977).

Leite gave a shorthand formula for § 1983 municipal liability without directly addressing the issue of an unconstitutional policy. If a supervisor could be held liable, the municipality was liable. *Leite*, *supra* at 589. *Leite's* expansion, *sub silencio*, of *Monell's* limited § 1983 municipal liability did not go unnoticed. The lower courts' use of the *Leite* case as precedent perpetuates the error. In the absence of an unconstitutional policy, clever yet ill-founded theories have expanded municipal liability beyond the limitations established by *Monell*. A policy which is constitutional should not be the Trojan Horse by which *respondeat superior* enters the walls of the municipal treasury.

B. *Gross Negligence Is Insufficient to Establish a Municipal Policy.*

Gross negligence is insufficient to establish policy based municipal liability under § 1983. First, gross negligence does not involve the conscious choice or deliberate conduct necessary to establish a municipal policy. Second, gross negligence is insufficient to establish a municipal policy violating the Due Process Clause of the Fourteenth Amendment.

1. Conscious Choice or Deliberate Conduct is Required to Establish a Municipal Policy.

"Municipal officers are only agents of the local public in its corporate capacity. . . ." McQuillin Mun. Corp. § 12.126

(3d ed.). Liability for official policy provides a strong financial incentive for citizens to insist upon sound city policies. The citizens give final policymaking authority and may take it back through local election or removal of nonelected public officers.

Once official policy is established, it is often implemented by municipal employees who do not have final policymaking authority. To hold the municipality and its citizens liable when nonpolicymaking employees act contrary to official policy, is *respondeat superior*.

"The 'official policy' requirement was intended to distinguish acts of the *municipality* from the acts of *employees* of the municipality. . ." *Pembaur*, 54 U.S.L.W. at 4292 (emphasis in original). The essential element of "official policy" is conscious choice or deliberate conduct on the part of a policymaker.

> [T]he word "policy" generally implies a course of action consciously chosen from among various alternatives; it is therefore difficult in one sense even to accept the submission that someone pursues a "policy" of "inadequate training," unless evidence be adduced which proves that the inadequacies resulted from conscious choice — that is, proof that the policymakers deliberately chose a training program which would prove inadequate. *Tuttle*, *supra* at 2436.

Pembaur explained:

> [M]unicipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. 54 U.S.L.W. at 4293.[5]

[5] Justice Brennan noted the definition of policy as "a specific decision or set of decisions designed to carry out such a chosen course of action." 54 U.S.L.W. 4293 n.9, citing Webster's New International Dictionary, at 1754 (Springfield, Mass. 3d ed. 1981)

Using "gross negligence" to establish policy is error.[6] By definition, gross negligence does not involve conscious choice or deliberate conduct.[7]

Where City policymakers by conscious choice or deliberate conduct have established a policy, this Court has permitted § 1983 municipal liability. See e.g., *Monell* v. *Dept. of Social Services*, *supra* (Municipal Board policy of compulsory maternity leave before it was medically required). *Owen* v. *City of Independence*, *supra* (City Council termination of employee without due process). *City of Newport* v. *Facts Concerts Inc.*, *supra* (City Council cancelled music promoters license in violation of the First Amendment). *Pembaur* v. *City of Cincinnati*, *supra* (District Attorney's unconstitutional policy of serving warrants). *Keyes* v. *School District No. 1*, 413 U.S. 189, 201 (1973) (School authorities policy of segregation). *Allee* v. *Medrano*, 416 U.S. 802 (1974), *Hague* v. *CIO*, 307 U.S. 496 (1939).

In contrast, where City policymakers did not consciously or deliberately adopt a policy, this Court has not imposed liability under § 1983. *Rizzo* v. *Goode*, *supra*, 374, 377. *City of Oklahoma City* v. *Tuttle*, 105 S.Ct. 2436. Requiring conscious choice or deliberate conduct to establish a policy assures the municipality is liable for the *act of the municipality*, rather

[6] Using a conscious choice or deliberate conduct standard avoids the use of ambiguous terminology to determine the existence of a municipal policy. See *Smith* v. *Wade*, 461 U.S. 30, 39 (1983).

[7] [M]ost courts consider that "gross negligence" falls short of reckless disregard of the consequences and differs from ordinary negligence only in degree and not in kind. There is, in short, no generally accepted meaning; but the probability is when the phrase is used, that it signifies more than ordinary inadvertance or inattention, but less perhaps than conscious indifference to the consequences. Prosser and Keeton on the Law of Torts, c. 5, § 34, at 212 (5th ed. 1984) (citations omitted).

See *Altman* v. *Aronson*, 231 Mass. 588, 591-592 (1919). Since the trial court instructed that either gross negligence or recklessness was sufficient and the First Circuit specifically approved liability on the lesser standard, this discussion focuses on gross negligence. However, it should be noted that petitioner contends recklessness falls short of the deliberate action or conscious choice needed to establish a municipal policy.

than for the *act of the employee*. *Pembaur, supra* at 4294 (purpose of official policy to distinguish acts of the municipality from acts of the employees).

Municipal policy is not established by gross negligence. Conscious choice or deliberate conduct by municipal policymakers is essential to formulate municipal policy. Without a policy, the "moving force" of the deprivation is left to speculation.[8]

2. More Than Gross Negligence Is Required Under the Fourteenth Amendment's Due Process Clause.

The level of culpability for a particular constitutional deprivation is determined by the nature of the right and the conduct required to violate the right. The right in this case is the constitutional right not to be deprived of life without due process of law. 777 F.2d 810 (T. 525). The Fourteenth Amendment's Due Process Clause requires conscious choice or deliberate conduct before policy based § 1983 municipal liability may be imposed. See e.g., *Arlington Hts.* v. *Met. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (invidious discriminatory purpose required for claim of racial discrimination under Equal Protection Clause); *compare Estelle* v. *Gamble*, 429 U.S. 97, 105

[8] This case has no evidence of conscious choice or deliberate action by a policymaker to inadequately train police officers. State law determines city policymakers. *Pembaur*, 54 U.S.L.W. at 4293. State law places the Springfield Police Department in the jurisdiction of the City Council or a Board of Police Commissioners. 1909 Mass. Acts c. 244, § 2. See, *Stebbins* v. *Police Comm. of Springfield*, 196 Mass. 365, 367 (1907); 1902 Mass. Acts c. 134, § 1.

The Police Department ordinance (R.O. City of Springfield, 1963, as amended, ch. 18) is not in evidence. The rules and regulations of the City's police department note that the Board of Police Commissioners have "appointment, management and control of the members of the Police Department." (A. 55.)

The City did not concede, as assumed by the First Circuit, that "the type of training received by Springfield's police officers [is] a matter of policy attributable to the City." 777 F.2d 807 n.5. A flat denial of a municipal policy of inadequate training is not a concession that what is denied is attributable to anyone.

(1976) (deliberate indifference to prisoners serious medical needs is cruel and abusive punishment under the Eighth Amendment), *with Whitley* v. *Albers*, 106 S.Ct. 1078, 89 L.Ed.2d 251, 261 (1986) (deliberate indifference standard applicable to medical needs in prison, wanton standard applicable to decisions involving use of force to restore order in prison under the Eighth and Fourteenth Amendments).

The nature of the due process right and the conduct required to violate the right reveals that gross negligence in police training is not enough. "[T]he Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property." *Daniels* v. *Williams*, 54 U.S.L.W. 4090, 4090 (1986) (emphasis in original). The Due Process Clause "serves to prevent governmental power from being 'used for purposes of oppression.'" *Id.* at 4091 quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856). Gross negligence does not amount to a governmental use of power to oppress. "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property." *Parrat* v. *Taylor*, 451 U.S. 527, 549 (1981) (emphasis in original) (Powell concurring in result). Gross negligence does not amount to deliberate conduct. *See Baker* v. *McCollan*, 443 U.S. 137, 148 (1979) (failure to adopt procedures for identifying arrestees was negligent rather than reckless when no previous notification of the legitimate need for or duty to adopt such procedures). *Rizzo* v. *Goode*, 423 U.S. at 376 (1976) (failure to take preventive measures to eliminate future police misconduct insufficient to impose liability).

Deliberate conduct is required under "substantive" and "procedural" due process. A substantive due process violation requires deliberate governmental conduct which "shocks the conscience" of the court. *Rochin* v. *California*, 342 U.S. 165, 172 (1952) (pumping suspect's stomach for evidence). *Johnson*

v. *Glick*, 481 F.2d 1028 (2d Cir.) *cert. denied* sub nom. *John* v. *Johnson*, 414 U.S. 1033 (1973), (prisoner beaten and denied medical attention). Likewise, deliberate conduct must be established for a procedural due process violation. *Ingraham* v. *Wright*, 430 U.S. 651 (1977) (paddling student), *Hudson* v. *Palmer*, 468 U.S. 517, 104 S.Ct. 3194 (1984) (intentional destruction of property).[9]

Requiring a conscious choice or deliberate action on the part of a policymaker provides a clear basis for determining municipal liability under § 1983. It allows courts to cull out unwarranted claims before trial. This rule would not eliminate the personal responsibility of the policymaker, but would provide a fault basis for § 1983 municipal liability. Without deliberate conduct on the part of a municipal policymaker, a theory of inadequate training is the wolf of *respondeat superior* in the sheep's clothing of a municipal policy.

II. The "Single Incident" Rule of *City of Oklahoma City* v. *Tuttle*, 105 S.Ct. 2427 (1985), Is Not Limited in Application to One Act By One Officer.

This Court in *City of Oklahoma City* v. *Tuttle*, 105 S.Ct. 2427 (1985) reversed a Tenth Circuit decision that allowed:

> the jury to infer a thoroughly nebulous "policy" of "inadequate training" on the part of the municipal corporation from the single incident described . . . and at the same time sanctioned the inference that the "policy" was the cause of the incident. . . .

[9] Although a protected interest, life, was at issue in this case, an adequate remedy exists under state law and precludes a finding of "lack of due process." *Hudson* v. *Palmer*, 468 U.S. 517 (1984) slip opinion at 16-18. The Massachusetts Torts Claims Act provides municipalities are liable for the negligent or wrongful acts of public employees. Mass. Gen. Laws Ann. c. 258, § 2. This remedy is adequate to satisfy procedural due process claims concerning negligence or gross negligence.

> Where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation. *Id.* at 2436.

Tuttle's prohibition of inferences is not limited to cases where only one officer and one shot are involved. The inferences are prohibited when drawn from the single incident in this case.

A. *Without Evidence of a Prior Pattern, the Inference of a "Policy" of Inadequate Training is Unwarranted.*

The First Circuit inferred, as did the Tenth Circuit in *Tuttle*, a policy without a prior pattern. Apart from the incident in question, there is no evidence of claimed misconduct on the part of the City's police.

A pattern which is known to a policymaker may be used to infer a "policy." *Herrera* v. *Valentine*, 653 F.2d 1220 (8th Cir. 1981) (requires knowledge of pattern of misbehavior). *Roman* v. *Richmond*, 570 F.Supp. 1544 (N.D. Ca. 1983) (supervisory official knowledge of pattern of violations). *Wellington* v. *Daniels*, 717 F.2d 932 (4th Cir. 1983) (needs widespread abuse and knowledge by supervisor) *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983) (must show pattern of similar incidents). Evidence to measure intent can be found in a prior pattern. *Keyes* v. *School District No. 1*, *supra* at 207, citing *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949), 2 J. Wigmore, Evidence 200 (3d ed. 1940), C. McCormick, Evidence 329 (1954).[10]

[10] The legislative history cited in *Monell* supports the conclusion that § 1983 imposes a duty to prevent only those deprivations which are known

No "pattern" exists from which "knowledge" can be attributed to a policymaker. The jury, without a charge on qualified immunity, found Troy, Schaub, and Risch did not violate Thurston's civil rights. (A. 39) The decisions of this Court do not allow § 1983 municipal liability on the basis of acts which do not cause a constitutional violation. See e.g., *City of Los Angeles* v. *Heller*, U.S. S.Ct. slip opinion No. 85-531, decided April 21, 1986.

Only one constitutional violation was found. The dissection of this single incident to create a pattern is unsound. As in *Tuttle*, this incident occurred in a very short period of time. Perry said his involvement with the chase of Thurston was less than a minute (A. 210). No City policymaker knew the weapons were discharged until after the fact. There is no proof that City policymakers ignored a situation which would lead to a constitutional violation.

The First Circuit's narrow definition of a single incident differs from other Circuits. See e.g. *Hughes* v. *Blankenship*, 612 F.2d 403 (4th Cir. 1981) (two shots and five officers were an isolated incident). *Gilmere* v. *City of Atlanta*, 737 F.2d 894 (11th Cir. 1984) reh. en banc, 777 F.2d 1495 (11th Cir. 1985) (decedent shot after an altercation with two city police officers held to be "isolated incident"). *McClelland* v. *Facteau*, 610 F.2d 693, 697 (10th Cir. 1979) (several constitutional violations by two state police officers and a jail guard referred to as "an isolated occasion."). *Owens* v. *Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979) (severe beating of plaintiff by approximately seven prison officials "a single brutal incident.")

At most, the evidence showed Thurston was killed by misconduct of a single officer. Perry's decision to shoot Thurston

---

to the City. *Monell*, 436 U.S. at 692. Proof of a pattern would not automatically prove knowledge. *Rizzo* v. *Goode*, 423 U.S. 362 (1976). This court should require an affirmative link between pattern and policymaker. To establish an affirmative link the pattern must be caused by inadequate training and the policymakers must actually know of the inadequacy.

was not a decision of the City. "[R]equisite fault on the part of the municipality" (*Tuttle* at 2436) is not shown by involvement of more than one person in a single incident. Fault was inferred without proof of a decision by a policymaker. "To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* rejected in *Monell*." *Tuttle*, 105 S.Ct. at 2440 (Brennan concurrence).

B. *The Inference of Causation Was Unwarranted Without Evidence of Specific Deficiencies in the City's Police Training.*

The First Circuit inferred the City's training was inadequate and caused Perry to shoot Thurston.[11] This inference lowers the standard of proof required by *Tuttle*, as revealed in the First Circuit's approval of jury instructions which did not require any "affirmative link" between training and the harm alleged.[12] The instruction was similar to *Tuttle* in that it contained:

---

[11] The inference was contrary to the evidence. There was evidence that the officers attended the police academy (A. 175, 210). There was evidence that the City police department rules and regulations are taught at the academy and refresher courses given (A. 172, 174-175). Perry, was aware of the City's rule restricting the use of deadly force (A. 207-208). See n.17, *infra*.

[12] The First Circuit approved the instruction despite acknowledging problems:

> We agree that these jury instructions could have been more detailed. The court could have used the Supreme Court's language to explain the need for an "affirmative link" between the City's policy and the harm. It could have emphasized the distinction between negligence and reckless or grossly negligent conduct. But while the district court's instructions could have been better, they were not defective. 777 F.2d at 810.

> loose language . . . leaving it to the jury to determine whether the alleged inadequate training would likely lead to "police misconduct." The fact that a municipal "policy" might lead to "police misconduct" is hardly sufficient to satisfy *Monell's* requirement that the particular policy be the 'moving force' behind a *constitutional* violation. There must at least be an affirmative link between the training inadequacies alleged, and the particular constitutional violation at issue. *Tuttle*, 105 S.Ct. at 2436-2437 n.8 (emphasis in original).

Where the policy at issue is not unconstitutional, *Tuttle* "increases the threshold of required proof." *Vippolis* v. *Village of Haverstraw*, 768 F.2d 40, 44 (2d Cir. 1985). In *Vippolis*, the Second Circuit correctly applied *Tuttle* and refused to infer a policy of inadequate training without "some showing that specific deficiencies in the training given police officers led the misbehaving officer to engage in the alleged misconduct." *Id.* at 45. There was no evidence of specific deficiencies in the City's training curriculum.[13]

Where professional judgment is involved this Court has stated:

[13] For training standards in the police profession see e.g., *Standards for Law Enforcement Agencies*, The Standards Manual of the Law Enforcement Agency Accreditation Program, (Fairfax, Virginia: Commission on Accreditation for Law Enforcement Agencies, Inc. 1985) pp. 33-1 through 33-9 (standards relating to training of law enforcement personnel), and National Advisory Commission on Criminal Justice Standards and Goals, *Report on Police* (Washington, D.C.: Government Printing Office, 1973) p. 394 (standards for new recruit training). See Mass. Gen. Laws c. 41, § 96B (Academy training required for Massachusetts police).

> [L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. *Youngberg* v. *Romeo*, 457 U.S. 307, 323 (1982).

Expert testimony would assist the trier of fact in determining whether a specific deficiency in training was the "moving force"of the harm alleged. The First Circuit did not require expert testimony, but acknowledged it's benefits.[14] It referred to an "affidavit of a putative expert" in a different case. 777 F.2d at 804 citing *Voutour* v. *Vitale*, 761 F.2d 812, 821-822 (1st Cir. 1985). The *Voutour* expert did not address the City of Springfield's police training. In this case no evidence was presented on the appropriateness of the techniques for the circumstances or the quality of the training in these techniques.[15]

Without evidence of specific deficiencies in police training, the inference that training caused Perry to shoot Thurston cannot be drawn. Absent "some limitation . . . placed on establishing municipal liability through policies that are not themselves unconstitutional . . . the test set out in *Monell* will become a dead letter." *Tuttle*, 105 S.Ct. at 2436.

[14] "Even without expert testimony, we believe a plaintiff could show by a preponderance of the evidence that, for example, the failure to train police officers in how to conduct high speed chases caused the death of an innocent pedestrian struck either by a police cruiser or the suspects car." 777 F.2d at 804. This reasoning has no application to the facts in this case.

[15] See *infra*, pp. 26-28.

III. A Policy of Inadequate Training May Not Be Inferred From the Conduct of Several Police Officers During a Single Incident Absent Evidence of Prior Misconduct in the Department or a Conscious Decision By Policymakers.

Unwarranted inferences of fault and causation were used to hold the City of Springfield liable under § 1983. The First Circuit created the inferences from "sparse evidence" summarized in six factors:

> (1) testimony that there was but little guidance for undertaking an automobile chase; (2) testimony, contrary to that of the officers, that Thurston was not posing a life-threatening hazard to them; (3) a department rule on the use of firearms which in part required preliminary resort to less severe alternatives, arguably ignored by the officers; (4) another part of the rule which proscribed firing where there was substantial danger to innocent people, arguably violated by the two officers; (5) a dispatcher's arguably overzealous announcement on police radio; and (6) evidence of looseness in investigating shootings. 777 F.2d at 804.

A review of each factor reveals the absence of an evidentiary foundation necessary to infer fault and causation.

A. THE FIRST FACTOR: "testimony that there was but little guidance for undertaking an automobile chase"

This factor was discussed by the First Circuit as follows:

> Although evidence on the Springfield Police Department's training practices was sparse, the testimony of

> two officers indicated that the department gave officers virtually no guidance in apprehending suspects fleeing in motor vehicles who ignored orders to stop. Schaub testified that he was told not to set up physical roadblocks but that he should use his lights and siren, stand in the street, and put up his hands in a stopping motion. Troy testified that his training on stopping a car consisted of being told to move up behind it, put on his lights and siren, and hope the suspect pulls over. 777 F.2d at 807.

The First Circuit concluded that the two techniques of stopping vehicles described by the officers "were not an effective method of slowing down a suspect who was unwilling to stop." 777 F.2d at 807. Crowding or surrounding Thurston's car with several police vehicles was suggested as an alternative to the use of deadly force. *Id.* at 807, 808. The First Circuit's suggested tactic is extremely dangerous and appropriate only where the use of deadly force is authorized. The suggested tactic is not an alternative to the use of deadly force.[16]

---

[16] The International Association of Chiefs of Police, A Manual of Model Police Traffic Services Policies and Procedures, U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT HS 806 906, January 1986, provides in procedure 1.20 and policy 1.21 (emphasis added):

EMERGENCY VEHICLE OPERATION — PURSUIT/EMERGENCY RESPONSE 1.20

V. PROCEDURES

5. Emergency Vehicle Operation and Tactics

a. Offensive Tactics

In the course of pursuit, deliberate contact between vehicles or forcing the pursued vehicle into parked cars, ditches, or any other obstacle, boxing in, heading off, ramming, or driving alongside the pursued vehicle while it is in motion shall be prohibited, unless such actions are specifically authorized by the commanding officer or the field supervisor. *Such actions may be approved only when the use of deadly force would be authorized.*

i. Roadblocks

The use of a roadblock must be authorized by the commanding officer or the field supervisor. Generally, a roadblock will be employed

The First Circuit's inference of fault and causation from the first factor is unwarranted and erroneous.

B. THE SECOND FACTOR: "testimony, contrary to that of the officers, that Thurston was not posing a life-threatening hazard to them."

The First Circuit assumed "[if] the jury believed the officers heard Thurston and knew he might stop voluntarily, the decisions to shoot, particularly to shoot to kill, reasonably could be viewed as the direct result of training that was grossly negligent." *Id.* at 807. This conclusion is unwarranted. If the officers knew Thurston would stop and shot anyway, that is murder plain and simple. Murder or attempted murder is not evidence of inadequate training. Perry testified he was aware of the rule restricting the use of deadly force (A. 207-208).[17]

only as a last resort. The use of a roadblock must be directly associated with the seriousness of the crime for which the suspect is wanted. The roadblock must be clearly visible and provide adequate warning to allow vehicles to come to a safe stop. *The roadway shall not be completely blocked unless the use of deadly force would be authorized.*

USE OF ROADBLOCKS IN EMERGENCY SITUATIONS 1.21

III. POLICY

Roadblocks shall not be implemented without express approval of supervisory and/or command officers.

Fixed or circle system roadblocks may be utilized as a necessary and acceptable police tactic in emergency situations, *if and only if, the use of deadly force would be authorized.*

Adequate warning to approaching traffic is a necessity. *Therefore unless the only vehicle reasonably expected as the first to approach the roadblock is that of the evader or violator against whom deadly force is authorized* and there is insufficient time to provide warning to that evader prior to his arrival, a reasonable system of warning to motorists approaching the roadblock shall be in operation prior to the closing of the highway by that roadblock.

[17] Rule 28 of the Police Department Regulations states in Section 12:

A department member shall not discharge a firearm in the performance of duty, except under the following circumstances, and then only after all other reasonable alternatives have been exhausted and where there is no substantial danger to the public.

Perry's conduct was not compelled by this rule. If Thurston was not presenting a life threatening situation and Perry fired in violation of the rule, such misconduct is not attributable to the City. "Without some evidence of municipal policy or custom independent of the police officer's misconduct, there is no way of knowing whether the city is at fault." *Tuttle,* 105 S.Ct. at 2440 (Brennan concurrence).

The First Circuit's inference of fault and causation from the second factor is unwarranted and erroneous.

C. THE THIRD FACTOR: "a department rule on the use of firearms which in part required preliminary resort to less severe alternatives, [was] arguably ignored by the officers"

Two violations of a rule during a single incident do not distinguish this case from *Tuttle's* single incident rule. The

1. To defend himself or another person from an attack which he has reasonable cause to believe could result in death or serious physical injury;
2. To effect an arrest, ONLY if—
   (a) The arrest is for a felony
   (b) the Officer reasonably believes that the force employed creates no substantial risk to innocent persons; and
   (c) the Officer reasonably believes that
      (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or
      (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.
   (d) the Officer should have either witness[ed] the crime or should have sufficient probable cause to reasonably believe that the subject committed a felony. . . .

SECTION 13. Firearms shall NOT be discharged:

1. As a warning or signal shot;
2. To effect a misdemeanor arrest;
3. *At or from a moving vehicle except when a life threatening situation exists or to apprehend a felon or one who has committed a felony involving the use of deadly force.* (A. 105-108).

This regulation tracks the Model Penal Code limitations (American Law Institute, Model Penal Code § 3.07(2)(b) (Proposed Official Draft 1962) and conforms to the Constitutional requirements of both State and Federal law. *Tennessee* v. *Garner,* U.S. , 105 S.Ct. 1694 (1985). *Commonwealth* v. *Klein,* 372 Mass. 823, 363 N.E.2d 1313 (1977); *Julian* v. *Randazzo,* 380 Mass. 391, 403 N.E.2d 931 (1980).

officers referred to by the First Circuit were Schaub, and Perry.[18] The First Circuit relied on the fact that Schaub "would have shot to kill if he could have gotten a clear shot," as a failure to consider alternative methods of stopping Thurston. 777 F.2d at 807. The opinion characterized Schaub as being "eager to shoot to kill." This is a misreading of the testimony. Schaub shot at the car after Thurston tried to run him over. Schaub "pulled [his] weapon out" only as he "was running into the extreme right lane and . . . [Thurston's] vehicle continued to come in a path which would impact with [him]." (A. 214-215.) Schaub was running out of the way of a '71 white Mercury which was approaching him at 45-50 miles an hour (A. 213). Schaub's action does not provide a basis for an inference of inadequate training. Perry testified that he shot at Thurston in part to stop the fleeing suspect and in part to protect himself because Thurston was trying to knock him off his motorcycle." *Id.* at 808.

There was no evidence that the officers' training, as opposed to their performance under stress, was improper. Liability based solely on the fact that an officer acted excessively and out of the ordinary would "unduly threaten . . . immunity from *respondeat superior* liability." *Tuttle*, 105 S.Ct. at 2440 (Brennan concurrence). While the harm might possibly be attributable to the City, "it is equally likely that the misbehavior was attributable to numerous other factors for which the city may not be responsible; the police officer's own unbalanced mental state is the most obvious example." *Id.* The First Circuit speculated that lack of training in roadblock techniques caused Perry to shoot Thurston, without evidence, expert or otherwise, of any specific deficiencies in police training standards.

The arguable violations of departmental rules do not avoid the single incident rule enunciated in *Tuttle*. Even if each shot

[18] Troy fired at the rear tire of Thurston's vehicle, hitting the rim of the tire (A. 220). The First Circuit suggested that "Perry could have shot out the rear tire of the car from his positions right behind and next to Thurston's vehicle, forcing the car to slow down." 777 F.2d at 807.

constitutes a separate incident, there is no affirmative link to policymakers. Unlike other cases relying on a "pattern" to impute knowledge to policymakers, here the shots were within minutes of each other. Two "arguable violations" of departmental rules during a single incident do not distinguish this case from *Tuttle*. "It is equally likely that the misbehavior was attributable to numerous other factors for which the city may not be responsible." *Tuttle*, 105 S.Ct. at 2440 (Brennan concurrence).

The First Circuit's inference of fault and causation from the third factor is unwarranted and erroneous.

D. THE FOURTH FACTOR: "another part of the rule which proscribed firing where there was substantial danger to innocent people, [was] arguably violated by the two officers."

The fourth factor the First Circuit relied on is the arguable misconduct of two officers in violating a police department rule. Once again the officers' "arguable violations" do not support an inference of a policy. There is no affirmative evidence that the police training with regard to deadly force compelled departure from the police department's own rule.

The First Circuit's inference of fault and causation from the fourth factor is unwarranted and erroneous.

E. THE FIFTH AND SIXTH FACTORS: "a dispatcher's arguably overzealous announcement on police radio and evidence of looseness in investigating shootings."

As the First Circuit acknowledged: "[o]n their own, these other policies were not proven sufficiently or linked sufficiently with the harm to impose municipal liability." *Id.* at 809. Neither factor is a City policy. Both occurred after Thurston was shot.

The First Circuit's use of the fifth and sixth factors to lend weight to the inferences of fault and causation is unwarranted and erroneous.

Considered in a light most favorable to plaintiff, the factors taken as a whole, do not support inferences of fault and causation necessary to hold the City liable under § 1983. The factors do not show prior misconduct in the department or a conscious decision by policymakers. The First Circuit's inferences amount to creating something out of nothing. The City is being held liable because Perry shot Thurston. This is not right.

Conclusion.

For the foregoing reasons, together with those asserted by the *amici*, this Court should reverse the judgment of the Court of Appeals for the First Circuit.

Respectfully submitted,
RICHARD T. EGAN,
Counsel of Record,
City Solicitor,
HARRY P. CARROLL,
Deputy City Solicitor,
EDWARD M. PIKULA,
Assistant City Solicitor,
SUSAN J. McFARLIN,
Staff Attorney,
DAVID G. SOUTHCOTTE, Clerk,
Law Department,
City of Springfield,
36 Court Street,
Springfield, Massachusetts 01103.
(413) 787-6085

Addendum.

MASSACHUSETTS GENERAL LAWS.

Chapter 41, § 96B.

41:96B. Certain Police Officers Required to Attend Police Training School, etc.; Compensation, etc.

Section 96B. Every person who receives an appointment to a position on a permanent full-time basis in which he will exercise police powers in a municipal police department, the metropolitan district commission police, Massachusetts Bay Transportation Authority police, capital police or the division of law enforcement within the department of fisheries, wildlife and recreational vehicles, and any employee of the registry of motor vehicles who will exercise police powers shall prior to exercising any police powers, be assigned to and satisfactorily complete a prescribed course of study at a regional or municipal police training school, approved by the Massachusetts criminal justice training council, hereinafter referred to as the council. Any person so attending such a school shall be paid the wages provided for the position to which he was appointed and such reasonable expenses as may be determined by the appointing authority.

Every regular police officer on a permanent full-time basis in any such municipal police department, the metropolitan district commission police, the Massachusetts Bay Transportation Authority police or the division of law enforcement within the department of fisheries, wildlife and recreational vehicles or an employee of the registry of motor vehicles having police powers shall be assigned to and shall attend a regional or municipal police training school approved by the council for the purpose of completing an approved course of study of in-

service training at such intervals and for such periods of time as the council may determine. Any such police officer who receives an appointment to a position of higher rank shall, in addition, complete such other courses of supervisory training as the council may determine. While attending such school or completing such courses, such person shall be paid his regular wages as a police officer and shall receive such reasonable expenses as may be determined by the appointing authority.

Each person appointed as a reserve, or intermittent police officer, in a city or town shall, prior to exercising any police powers, satisfactorily complete a course of study prescribed by the council.

The appointing authority shall submit to the council, within one month of appointment, the name and date of appointment of any person who will exercise police powers. Upon petition to the council by the appointing authority, a person so appointed may be exempted by the council, in whole or in part, from the provisions of this section prior to his exercising police powers.

Failure of an appointed person to comply with the provisions of this section prior to his exercising police powers, shall result in the appointed persons removal by the appointing authority, provided said person has not been exempted therefrom by the council as herein provided. Failure of an appointed person to satisfactorily complete the prescribed course of study, shall result in his removal by the appointing authority.

Every municipal, county and state employee employed by the department of corrections, the division of youth service, the parole board or any county correctional institution whose duties require contact with persons committed to institutions or persons on parole from said institutions shall complete a course of study as prescribed by the Massachusetts criminal justice training council at such time and at such intervals as it shall determine. Exemption from the requirement that training

be completed prior to exercising any police powers may be waived by the Massachusetts criminal justice training council for individuals enrolled in specific training programs.

. . . . . .

MASSACHUSETTS GENERAL LAWS.

Chapter 209A, § 3.

209A:3. Complaint Requesting Protection From Abuse; Particular Orders and Duration of Orders; Effect of Prior or Pending Divorce Orders.

Section 3. A person suffering from abuse from an adult or minor family or household member may file a complaint in the court requesting protection from such abuse, including, but not limited to, the following orders:

(a) ordering the defendant to refrain from abusing the plaintiff whether the defendant is an adult or minor;

(b) ordering the defendant to vacate forthwith the household. Notwithstanding the provisions of section thirty-four B of chapter two hundred and eight, an order to vacate shall be for a fixed period of time, not to exceed one year, at the expiration of which time the court may extend any such order upon motion of the plaintiff for such additional times as it deems necessary to protect the plaintiff from abuse;

(c) awarding the plaintiff, in the case of husband and wife, temporary custody of a minor child;

(d) ordering the defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody or both, when the defendant has a legal obligation to support such a person;

(e) ordering the defendant to pay to the person abused monetary compensation for losses suffered as a direct result

of such abuse. Compensatory losses shall include, but not be limited to, loss of earnings or support, out-of-pocket losses for injuries sustained, medical and moving expenses and reasonable attorneys' fees;

(f) ordering the plaintiff's address to be impounded as provided in section eight.

No filing fee shall be charged for the filing of the complaint. The plaintiff shall not be charged for copies of orders entered by the court.

Any relief granted by the court shall be for a fixed period of time not to exceed one year, at the expiration of which time the court may extend any order, upon motion of the plaintiff, for such additional time as it deems necessary to protect the plaintiff from abuse. The court may modify its order at any subsequent time upon motion by either party.

No order under this chapter shall in any manner affect title to real property.

Any action commenced under the provisions of this chapter shall not preclude any other civil or criminal remedies. A party filing a complaint under this chapter shall be required to disclose any prior or pending actions for divorce under chapter two hundred and eight, separate support under two hundred and nine, or abuse prevention under this chapter.

If there is a prior or pending order from the probate and family court department of the trial court for divorce under chapter two hundred and eight, or separate support under chapter two hundred and nine, an order issued in the district court or Boston municipal court departments pursuant to this chapter shall be restricted to ordering the defendant to refrain from abusing the plaintiff whether the defendant is an adult or minor, or ordering the defendant to vacate forthwith the household.

If the parties to a proceeding under this chapter are parties in a subsequent proceeding for divorce under chapter two hundred and eight or for separate support under chapter two

hundred and nine, any custody or support order or judgment issued in the divorce or separate support proceeding shall supersede any prior custody or support order under this chapter.

Chapter 209A, § 6.

209A:6. Duties of Law Officer; Notice of Rights.

Section 6. Whenever any law officer has reason to believe that a family or household member has been abused or is in danger of being abused, such officer shall use all reasonable means to prevent further abuse, including: (1) remaining on the scene as long as there is immediate danger to the physical safety of such person without the presence of a law officer, including but not limited to staying in the dwelling unit for a reasonable period of time; (2) assisting such person in obtaining medical treatment necessitated by an assault, which may include driving the victim to the emergency room of the nearest hospital, or arranging for appropriate transportation to a health care facility, any law to the contrary notwithstanding; (3) giving such person immediate and adequate notice of his or her rights; (4) arresting any person whom the officer has probable cause to believe has committed a felony; (5) arresting any person who has committed, in the officer's presence, a misdemeanor which involves abuse; (6) arresting any person whom the officer has probable cause to believe has committed a misdemeanor pursuant to section thirty-four C of chapter two hundred and eight or section seven of chapter two hundred and nine A.

The notice as required in clause (3) of section six shall consist of handing such person a copy of the following statement written in English and Spanish and reading the same to such person in English.

"You have the right to go to the superior, probate, and family, district or Boston municipal court if you reside within the appropriate jurisdiction, and file a complaint requesting any of the following applicable orders; (a) an order restraining your attacker from abusing you; (b) an order directing your attacker to leave your household; (c) an order awarding you custody of a minor child; (d) an order directing your attacker to pay support for you or any minor child in your custody if the attacker has a legal obligation to support them; and (e) an order directing your attacker to pay you for losses suffered as a result of the abuse, including medical and moving expenses, loss of earnings or support, attorneys fees and other out-of-pocket losses for injuries sustained."

For an emergency on weekends, holidays or weeknights, you should contact the police, who will refer you to a justice of the superior, probate and family, district or Boston municipal court departments.

"You have the right to go to the appropriate district court or the Boston municipal court and seek a criminal complaint for threats, assault and battery, assault with a deadly weapon, assault with intent to kill or other related offenses.

"If you are in need of medical treatment, you have the right to request that the officer present drive you to the nearest hospital or otherwise assist you in obtaining medical treatment.

"If you believe that police protection is needed for your physical safety, you have the right to request that the officer present remain at the scene until you and your children can leave or until your safety is otherwise insured".

1902 MASSACHUSETTS ACTS.

Chapter 134.

AN ACT RELATIVE TO THE POLICE DEPARTMENT OF THE CITY OF SPRINGFIELD.

Be it enacted, etc., as follows:

Certain powers, etc., relative to the police department of Springfield to be performed, etc., by the city council.

SECTION 1. The powers and duties conferred and imposed by chapter ninety-four of the acts of the year eighteen hundred and fifty-two upon the mayor and aldermen of the city of Springfield in relation to the establishment and maintenance of a police department, the appointment of a constable, or a city marshal and assistants, and all other police officers, may be exercised and performed by the city council, in such manner as it may from time to time prescribe, and wholly or in part through the agency of any persons acting as a board whom it may from time to time designate, and with such limitations of power as it may by ordinance determine.

SECTION 2. This act shall take effect upon its passage.

Approved February 27, 1902.

1909 MASSACHUSETTS ACTS.

Chapter 244.

AN ACT RELATIVE TO THE APPOINTMENT OF CERTAIN POLICE OFFICERS AND CONSTABLES OF THE CITY OF SPRINGFIELD AND TO THE ELECTION OF A CITY COLLECTOR OF SAID CITY.

Be it enacted, etc., as follows:

Powers of mayor and aldermen in regard to appointments, etc.

SECTION 1. The mayor and aldermen of Springfield shall have exclusive power to appoint a constable and assistants, or

a chief of police, a deputy chief of police and assistants, with the powers and duties of constables, and all other police officers, and to remove the same in the manner provided by law. They may require any person appointed a chief of police, a deputy chief of police or a constable of the city to give bond,

Certain officers to give bond.

with such security as they may deem reasonable, before he enters upon the duties of his office; upon which bonds the like proceedings and remedies may be had as upon constables' bonds taken by selectmen of towns.

Certain powers may be exercised by the city council, etc.

SECTION 2. The powers and duties conferred and imposed by section one of this act upon the mayor and aldermen of the said city in relation to the establishment and maintenance of a police department, the appointment of a constable, a chief of police, deputy chief of police and assistants, and all other police officers, may be exercised and performed by the city council, in such manner as it may from time to time prescribe, and wholly or in part through the agency of any persons acting as a board whom it may from time to time designate, and with such limitations of power as it may by ordinance determine.

City collector, election, etc.

SECTION 3. The city council of the city of Springfield shall annually, as soon after its organization as may be convenient, elect, in convention, a city collector who shall have all the powers and perform all the duties heretofore had and performed by the collector of taxes of said city.

Repeal.

SECTION 4. So much of section eight of chapter ninety-four of the acts of the year eighteen hundred and fifty-two as is inconsistent herewith, and chapter one hundred and thirty-four of the acts of the year nineteen hundred and two, are hereby repealed.

SECTION 5. This act shall take effect upon its passage.

Approved April 1, 1909.

REPLY

BRIEF

Supreme Court, U.S.
FILED
AUG 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF SPRINGFIELD, MASSACHUSETTS,
Petitioner,

v.

LOIS THURSTON KIBBE, etc.,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit

BRIEF FOR RESPONDENT

TERRY SCOTT NAGEL*
THOMPSON, NAGEL & THOMPSON
Suite 545
94 State Street
Springfield, MA 01103
(413) 781-4243

J. LEVONNE CHAMBERS
ERIC SCHNAPPER
NAACP Legal Defense
and Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, NY
(212) 219-1900

Counsel for Respondent
**Counsel of Record*

PRESS OF BAIR PRINTING, HYATTSVILLE, MD 20781 (301) 864-0222

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. MUNICIPAL LIABILITY UNDER *MONELL* v. *NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES* MAY BE BASED ON A MUNICIPALITY'S POLICIES REGARDING TRAINING OR SUPERVISION OF ITS EMPLOYEES	10
A. The Proceedings Below	10
B. Liability Based On Training And Supervision Policies	14
C. The Scope Of A Monell Training Claim	22
II. *CITY OF OKLAHOMA CITY* v. *TUTTLE* DOES NOT REQUIRE REVERSAL OF THE JUDGMENT BELOW	28
III. THE EVIDENCE IS SUFFICIENT SUPPORT THE JURY VERDICT	33
A. The Standard Of Review	33
B. Municipal Policy Regarding The Use Of Lethal Force	38
C. Municipal Training Policy	43
CONCLUSION	47

TABLE OF AUTHORITIES

Page

CASES

Anderson v. *Smith*, 226 U.S. 439 (1913) 34
Bailey v. *Central Vermont R. Co.*, 319 U.S. 350 (1943) 33, 34
City of Los Angeles v. *Heller*, 106 S.Ct. 1571 (1986) 29
City of Oklahoma City v. *Tuttle*, 105 S.Ct. 2427 (1985)..... *passim*
Continental Ore Co. v. *Union Carbide Co.*, 370 U.S. 690 (1962) 34
Daniels v. *Williams*, 106 S.Ct. 662 (1986)..... 25, 26
Davidson v. *Cannon*, 106 S.Ct. 668 (1986) 26
Depew v. *St. Mary's*, 787 F.2d 1496 (11th Cir. 1986) 26
Ellis v. *Union Pacific R. Co.*, 329 U.S. 649 (1947) 35
Fiacco v. *City of Rensselaer, N.Y.*, 783 F.2d 319 (2d Cir. 1986)..... 20
Gilmere v. *Atlanta*, 737 F.2d 894 (11th Cir. 1984) *rev'd*, 774 F.2d 1495 (11th Cir. 1985) *cert. denied*, 106 S.Ct. 1993 (1986)..... 26
Gunning v. *Cooley*, 281 U.S. 90 (1930)..... 34
Jones v. *East Tennessee V. & G.R.Co.*, 128 U.S. 443 (1888) 36
Kane v. *Northern Cent. R. Co.*, 128 U.S. 91 (1888) 34
Kibbe v. *City of Springfield*, 777 F.2d 801 (1st Cir. 1985)..... 38
Lavender v. *Kurn*, 327 U.S. 645 (1946)..... 33, 34
Meritor Savings Bank v. *Vinson*, 54 U.S.L.W. 4703, ___ S.Ct. ___ (1986) 10
Monell v. *New York City Department of Social Services*, 436 U.S. 658 (1978)..... *passim*
Parklane Hoisery Co. v. *Shore*, 439 U.S. 322 (1979).. 36, 37
Pawling v. *United States*, 8 U.S. (4 Cranch.) 219 (1808) 34
Pembaur v. *Cincinnati*, 106 S.Ct. 1292 (1986)..... 9, 14, 15, 16, 17
Railroad Co. v. *Jones*, 95 U.S. 439 (1877)..... 27
Richmond & Danville Railroad Co. v. *Powers*, 149 U.S. 43 (1893)..... 34
Scheuer v. *Rhodes*, 416 U.S. 232 (1974)..... 10
Sioux City & Pacific R.R. Co. v. *Stout*, 84 U.S. (17 Wall.) 657 (1874)..... 22

Table of Authorities Continued

Page

Tennant v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29 (1944)..... 33, 34, 35
Tennessee v. *Garner*, 105 S.Ct. 1694 (1985).. 7, 16, 19, 21, 26
The Nitroglycerine Case, 82 U.S. (15 Wall.) 524 (1872) . 27
Tiller v. *Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943) 35
Wilkerson v. *McCarthy*, 336 U.S. 53 (1949)..... 33

STATUES

42 U.S.C. § 1983 (1871) 18
42 U.S.C. § 1986 (1971) 6, 26

RULES

Rule 51, Federal Rules of Civil Procedure..... 11, 13

RESTATEMENTS

Restatement (Second) of Agency, Section 213 (1958).... 17
Restatement (Second) of Agency, Section 215 (1958).... 41

REPORTS

Annals of Cong. 435 (1789) 37

TREATISES

G. Rude, *Wilkes and Liberty*, 17-37 (1932) 36
J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 658 (1856) 37
Keeton, *Prosser and Keeton on Torts*, (5th Ed. 1984)... 32
The Writings of Thomas Jefferson, 71 (Washington ed. 1961)..... 36

STATEMENT OF THE CASE

In this case, as is typical of police misconduct cases which go to trial, most of the important facts were the subject of fierce disagreement. Only a few of the circumstances surrounding the death of Clinton Thurston were undisputed. Among those was the fact that Clinton Thurston was shot in the head and killed by Springfield Police Officer Theodore Perry on September 28, 1981. Following a report that a restraining order was being violated, Thurston had become the subject of an "all cars" broadcast and a chase involving up to twenty police officers. (Tr. 149, 582.) He was shot at four times or more in three separate locations, beaten after Perry's bullet rendered him unconscious, and taken to a hospital where he died.

Thurston and Pamela Etter had a tempestuous relationship, living together off and on for four years and having two children. (Tr. 247, 667, 769.) The day before Thurston was killed, Etter had moved out of the apartment she shared with Thurston after her parents refused an invitation to visit the couple's home to celebrate her son's birthday. (Tr. 800, 839.) Etter went to stay with a friend, Dorothy Gilbert, and applied for a restraining order on the morning of the 28th. (Tr. 840.) There is no evidence that the order was ever served on Thurston, and it was unclear from testimony whether he ever became aware that it existed.

On the evening of the 28th, Thurston went to the house where Etter was staying and disabled her car to prevent her from leaving. (Tr. 644.) He returned later, forcing her to get into his car to go to his sister's house. (Tr. 843-849.) Etter testified at the inquest into Thurston's death that when she got into his car, she said she would drive, but that he pushed her over to the passenger seat and "said

no, he was driving." (Tr. 849.) After that, the police received a series of calls from Gilbert in which she said Thurston had threatened the occupants of the apartment with a knife, broken open the apartment door, and then assaulted and kidnapped Etter. The accuracy of Gilbert's accusations, whether the police officers involved in Thurston's death learned of them through broadcasts from the police dispatcher, when the information was broadcast, and whether the police had any reasonable basis for believing that the reports were correct were among the issues in dispute at trial.

Thurston and Etter set off from the apartment driving in the direction of Thurston's sister's home. When officer Eric Risch approached the car while it was stopped at an intersection, Thurston drove off. Thurston continued to drive towards his sister's home, at speeds estimated at 40 to 45 miles per hour, pursued by an increasing number of police cars. Officers Frank Daigneau and John Troy, in an attempt to intercept Thurston, parked their police car across the lane in which he was driving, and Troy stood in the middle of the road waving to Thurston to stop. The witnesses disagreed about what occurred at this roadblock; Troy asserted Thurston attempted to run him down, but Etter insisted Thurston had merely changed lanes to avoid colliding with Troy's car. (Tr. 900.) In any event, after Thurston and Etter passed the roadblock, Troy fired at their car, hitting the wheel rim. A block away Thurston encountered a similar partial roadblock; officer Kenneth Schaub also placed his car across the lane in which Thurston was driving, and stood in the middle of the road waving to Thurston to stop. Etter testified that Thurston again changed lanes to avoid hitting the police car; Schaub, on the other hand, thought Thurston had tried to hit him. Schaub, too, drew his revolver and fired at the car in which Thurston and Etter were driving.

After the car passed this second roadblock, officer Theodore Perry, who was on a motorcycle, accelerated past several cruisers and caught up with Thurston. Perry fired two shots at Thurston; the second shot hit Thurston in the head, rendering him immediately unconscious, and ultimately causing his death. The circumstances of the shooting were the subject of particular dispute. Perry testified that three times he attempted to bring his motorcycle abreast of the Thurston car, and that in each instance Thurston had tried to run him off the road. (Tr. 288-289.) Perry asserted that he shot at Thurston during the second and third such swerving incidents. Respondent maintained that Thurston had never swerved at Perry at all, arguing in particular that Thurston's car had continued straight down the road after Thurston was shot, which could not have occurred if Thurston was swerving at the time of the shooting. (Tr. 301-302.)

When the car rolled to a stop with the unconscious Thurston slumped behind the wheel, officer Risch ran to the driver's side window and, observing that Thurston neither moved nor spoke, hit him on the head with a flashlight. (Tr. 19, 498-499; 544.) Kimberly Fowlkes, whose breezeway door had stopped Perry's first bullet, testified that she ran to her window and saw several officers beating Thurston with long objects as he lay helpless on the pavement. (Tr. 82-87.) All of the police officers denied that the second beating ever occurred.

Thurston was then transported to a nearby hospital, but the officers who brought him there did not inform the hospital staff that Thurston had been shot. There was conflicting testimony regarding which officer or officers were responsible for the failure to disclose the shooting to the hospital. The doctors, perplexed by Thurston's grave condition following what was described to them by police

as a traffic accident, (Tr. 590), eventually took x-rays and detected the bullet in Thurston's brain. Thurston died shortly thereafter. (Tr. 6, 16.)

Respondent Lois Thurston Kibbe brought this action in federal court seeking damages on behalf of Thurston's estate. She named as defendants a number of the police officers involved in the chase, shooting and beating of Thurston, as well as the City of Springfield. Respondent alleged that the city and the officers had deprived Thurston of his life in violation of the United States Constitution. In an answer filed jointly with officer Perry, the city asserted: "At all times material, each of the . . . defendants was *acting in accordance with* the rules and regulations of the Springfield Police Department . . ." (A. 25.) (emphasis added).

At the outset of the trial, respondent voluntarily dismissed her claims against all of the defendant police officers other than Perry, Troy, Schaub and Risch. The jury returned a verdict against Perry and the city, but found for the three other officers. It awarded $1 in compensatory damages and $500 in punitive damages against officer Perry, and $50,000 compensatory damages against the city. The district court denied the city's motion for judgment notwithstanding the verdict, explaining that on the evidence adduced at trial the jury could have found that "Perry acted unconstitutionally *pursuant to* his department's own policies." (A. 46.) (emphasis added).

Perry and the city appealed the jury's verdict, but Perry subsequently withdrew his appeal. In the court of appeals the city expressly acknowledged that municipal liability under *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), could be based on a city's training policy (see pp. 12-13, infra), but urged that

there was insufficient evidence to support a finding that the city's training policies had caused Thurston's death. The city did not challenge the district court's instructions that municipal liability could be based on inadequate training, and did not dispute the jury's conclusion that the shooting of Thurston was unconstitutional. The court of appeals upheld the jury's verdict. The city then sought review by this Court, asserting for the first time in the five year history of the litigation that municipal liability could never be based on a city's training policies.

SUMMARY OF ARGUMENT

The rejection of *respondeat superior* as a basis for liability announced in *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978) does not necessitate the fashioning of a whole new body of jurisprudence. Traditional common law agency principles can be appropriately applied to reach predictable and consistent results in Section 1983 municipal liability cases.

I. The City of Springfield did not object at trial to the jury instruction which allowed municipal liability to be based on a "failure to train, supervise or discipline [which] is reckless or grossly negligent . . ." In fact, the city itself requested an instruction which included both a theory of liability based on failure to train and the gross negligence standard. The city is therefore precluded from attacking the propriety of this instruction on appeal by Rule 51, Federal Rules of Civil Procedure. The city also included both the theory and the standard in its motions for directed verdict and judgment n.o.v. Neither issue is therefore now properly before the Court.

The city requests this Court to fashion a broad exception to the principle set forth in *Monell*, that municipalities are liable for constitutional violations which their

actions cause, by holding that evidence about training is simply irrelevant to a Section 1983 action. Such a rule would ignore the reality that training and supervision is virtually the sole manner in which municipalities announce and implement policy with regard to some types of employees. It would depart from normal principles of agency law, under which a principal has a duty of reasonable care in the selection, training and supervision of its agents. Such a rule would lead to incongruous results, and provide an incentive for cities to shelter unconstitutional policy from accountability by implementing it through training rather than by other means.

The city's contention that municipal liability is precluded unless the underlying policy, rather than the conduct it causes, is unconstitutional finds support in neither the language of the statute nor the case law. *See e.g. Monell* v. *New York City Department of Social Services*, 436 U.S. at 692; *City of Oklahoma City* v. *Tuttle*, 105 S.Ct. 2427, 2436 (1985); *Id.* at 2441, n.8. Such an interpretation would defeat the remedial purpose of the statute and divorce exposure to liability from causation and fault.

Although the Court need not reach the question to decide this case, the legislative history of Section 1983 demonstrates that Congress intended a simple negligence standard to apply to municipalities where a constitutional deprivation occurs. Section 6 of the act imposes liability upon persons who, "having the power to prevent" constitutional deprivations, "*neglect* to do so," measuring damages by the amount of injury which *reasonable diligence* could have prevented." 17 Stat. 15 (1871), (emphasis added). The requirement that a higher degree of fault on the part of municipal employees be proved with regard to Due Process claims has little bearing on cases like this

one, where the employee responsible for the deprivation acted intentionally, and Fourth Amendment rights were implicated by the unnecessary use of deadly force during an arrest. *See Tennessee* v. *Garner*, 105 S.Ct. 1694 (1985).

II. The jury in this case was instructed explicitly that a single incident of excessive force was insufficent to support a finding a liability against the City of Springfield. (A. 234.) From the evidence in this case, the jury could reasonably infer that eight or more police officers had engaged in the unreasonable use of force against Clinton Thurston.

Beyond the evidence about what happened the evening Thurston was killed, the jury heard evidence about the virtual nonexistence of training with regard to stopping fleeing suspects in vehicles, and other department policies, customs or practices which could have been affirmatively linked to Thurston's death. This case does not suffer from the defective instruction given in *Tuttle*, and there was evidence from which the jury could have found the city liable.

III. Appellate review of the sufficiency of evidence underlying a jury verdict rendered by a properly instructed jury is narrowly restricted by the Seventh Amendment. Appellate courts are required to view the evidence in the light most favorable to the party against whom the motion for directed verdict or for judgment n.o.v. is made. Resolution of conflict in the testimony is the function of the jury, and nothing in *Monell* suggests that the allocation of those functions is to be shifted in Section 1983 cases. Deference to the role of the jury is particularly appropriate in actions seeking redress for constitutional violations by government officials.

The trial judge who heard this case believed that Thurston's estate had not only introduced substantial evi-

dence of a constitutional violation resulting from inadequate training, but also had provided a substantial basis for a jury determination that city policy condoned the unconstitutional use of force which caused Thurston's death. The judge said: "If the latter is the case--and there is substantial evidence from which a jury could conclude this—then Perry acted unconstitutionally pursuant to his department's own policies." (A. 46.)

There was evidence from which the jury could have concluded that the city had found Perry's conduct consistent with its policy. The city's written policy permitted the use of deadly force under some circumstances in which such force would have been unconstitutional under the unobjected-to instructions of this case. The Assistant City Solicitor who represented Perry argued that Perry was under an absolute "duty and obligation" to stop Thurston, and had not violated the city's regulations in doing so.

The city's argument in this Court—characterizing Perry's conduct as a violation of the rules, or possibly murder—directly contradicts its deliberate tactical choice to proceed at trial on the theory that Perry "was acting in accordance with the rules and regulations of the Springfield Police Department." Defendants' Answer (A. 25.) The jury verdict in favor of three of the individual defendants, and the award of minimal damages against Perry, strongly indicates that the jury was persuaded by the argument that the police officers were merely following orders, an argument which the city itself did not dispute at trial.

Inconsistencies in police testimony; the version of events told by an uninvolved civilian witness; and the jury's analysis of exhibits and observations in the course of

a view of the scene of the chase, shootings, and beatings all provided a further basis for the jury's evaluation of these conflicts to determine whether the use of excessive force against Thurston by eight or more police officers was so blatantly unjustified and unnecessary that no properly trained police force would engage in such tactics. Beyond this evidence, there was direct testimony regarding the meager training with respect to stopping fleeing suspects in vehicles, an indication of generally poor firearm handling practices, and chaotic post-shooting procedures which deprived Thurston of whatever opportunity he had to benefit from medical treatment once he was taken to the hospital. The jury could have reasonably inferred from this evidence that Perry's intentional violation of Thurston's constitutional rights during what should have been a routine arrest was the reasonably foreseeable consequence of the city's inadequate training policy.

ARGUMENT

In the years since *Monell* held that municipal liability could not be based on the principle of *respondeat superior,* the federal courts have struggled to define the rules of liability that should be applied to a Section 1983 action against a city. Although we do not quarrel with the result in either *Tuttle* or *Pembaur,* we believe there is some substance to Justice Stevens' concern that the Court may become forced to build on *Monell's* reference to "official policy" a whole new body of jurisprudence with little basis in the legislative history or background of section 1983. The divergent interpretations of *Monell* among the lower courts suggest that such an *ad hoc* approach is likely to spawn an ongoing series of new issues.

We urge the Court, in resolving this case, to rely on the traditional common law agency principles that would

ordinarily be applicable in a case not controlled by respondent superior. *cf. Meritor Savings Bank* v. *Vinson*, 54 U.S.L.W. 4703, 4707, ___ S.Ct. ___ (1986). This Court has repeatedly emphasized in other contexts that Section 1983 should be construed in light of the common law rules of which Congress would have been aware in 1871. *Scheuer* v. *Rhodes*, 416 U.S. 232, 238-249 (1974). If, as *Monell* held, Congress did not intend municipal liability to be governed by *respondeat superior*, it is reasonable to assume that Congress contemplated that the other ordinary rules of agency law would apply. Utilization of agency principles in municipal liability cases will increase the predictability and coherence of *Monell* litigation, and provide the lower courts with an established and familiar body of law on which to rely in resolving the issues of accountability, foreseeability and proximate causation that frequently arise in these cases.

I. MUNICIPAL LIABILITY UNDER MONELL v. NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES MAY BE BASED ON A MUNICIPALITY'S CUSTOMS OR POLICIES REGARDING TRAINING OR SUPERVISION OF ITS EMPLOYEES.

(A) The Proceedings Below

An appellate court called upon to review a jury verdict in a civil case does not ordinarily undertake to decide in the abstract which party ought to have prevailed at trial. The role of the appellate courts is usually limited to two decidedly narrower tasks—ascertaining whether the instructions were correct as a matter of law, and determining, to the very limited degree permitted by the Seventh Amendment, whether the evidence was sufficient to support the findings of fact implicit in the jury's verdict.

At the close of the evidentiary phase of the trial in this case the district judge gave the jury the following instruction:

> Where a city's failure to train, supervise or discipline is reckless or grossly negligent, and this failure constitutes a custom or practice of the city, then the city may be held liable under Section 1983. (A. 234-235.)

If the interpretation of *Monell* now advanced by petitioner is correct, this instruction was erroneous.

But the city did not ask in its petition that this Court determine the correctness of this instruction. Nor does the city argue directly in its brief that the instruction was mistaken. Indeed, nowhere in either its petition or its brief did the city even refer to the instruction quoted above. The reason for that omission is clear: the city never objected to this instruction during any of the proceedings in the courts below, and is thus precluded from doing so here.

Rule 51 of the Federal Rules of Civil Procedure provides that "No party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict." Following the reading of the jury instructions, counsel for petitioner voiced no objection to the instruction which permitted the jury to base a determination of municipal liability upon a failure to train. On the contrary, the city itself had proposed an instruction that would have expressiy authorized a finding of liability based on inadequate training.[1]

---

[1] "The City of Springfield cannot be found liable for negligently failing to train a single police officer. It is the plaintiffs burden to prove, not merely an isolated incident of negligent training, but must show either a pattern of similar incidents or the existence of wide-

The city attorney's single comment upon the instructions can at most be construed as a request for additional comment upon the Plaintiff's burden to prove more than a single incident of police misconduct, which is indeed the interpretation of that remark urged upon the court of appeals by the City below.[2]

Both in its motion for directed verdict and in its motion for judgment notwithstanding the verdict, the city argued that respondent failed to prove that the "city of Springfield . . . negligently trained . . . any . . . Springfield Police Officer. (A. 26, 41.) The city nowhere suggested that such proof would have been insufficient as a matter of law, and never asserted during post-verdict litigation in the trial court that the jury instructions were in any respect deficient.[3] In the Court of Appeals, the city again agreed that liability could be based on inadequate training and supervision, and again failed to challenge the jury instruction on that issue:

---

spread incompetence throughout the police force. (citations omitted).

"It is not the City's burden of proving its training was adequate, but rather, it is the plaintiff's burden to prove the City's training was inadequate.

"Further, the plaintiff has the burden of proving the City was not merely negligent in its training, but grossly negligent in failing to train its police officers. (citations omitted).

"In order to *find the City of Springfield liable for negligently training its police officers*, you must also find that the negligent training was the proximate cause of plaintiff's injuries." Defendant City of Springfield's Request for Jury Instructions (A. 28) (emphasis added).

[2] (Tr. 957) *see* Reply Brief for Defendant-Appellant, No. 85-1078 pp. 11-12.

[3] Defendant City of Springfield's Motion for Judgment Notwithstanding the Verdict. (A.41.)

> *Monell* has . . . been interpreted to hold that a municipal policy of authorizing or condoning police misconduct can be inferred where the municipality has been grossly negligent in the supervision and training of its police force. . . . [I]solated incidents of negligent training or supervision are insufficient to establish . . . Section 1983 liability. . . . [T]o sustain an action under Section 1983 on a theory of negligent training, training must be nonexistent or reckless, or grossly palpably and culpably negligent before liability will attach.[4]

Petitioner's reply brief in the court of appeals also expressly acknowledged that municipal liability under *Monell* could be based on municipal training policy provided that there was "proof that the lack of proper training was so severe as to reach a level of 'gross negligence' or 'deliberate indifference' to the deprivation of a citizen's civil rights."[5]

Having consistently maintained in the District Court and Court of Appeals that municipal liability could be based on inadequate training and supervision, and having previously embraced a gross negligence standard, petitioner in this Court denounces the lower courts for applying those very principles. Petitioner's eleventh hour reversal of its position may be a deft response to the failure of its evidentiary arguments, but both Rule 51 and the established practice of this Court preclude a petitioner from relying here on contentions which it never preserved or raised below.

---

[4] Brief for Defendant-Appellant, No. 85-1078, pp. 7-8; *see also id.* at 11 (liability based on "gross negligence in training").

[5] Reply Brief for the Defendant-Appellant, No. 85-1078, p. 3.

(B) Liability Based On Training And Supervision Policies

Monell held that a city could be held liable in a Section 1983 action whenever a city policy had caused a constitutional violation to a aggrieved plaintiff. The city urges this Court to fashion a broad exception to that rule, under which a deliberately adopted municipal policy regarding training or supervision, unlike all other municipal policies, can never be the basis of municipal liability, regardless of whether that training or supervision policy had the direct and entirely predictable effect of causing serious, or even fatal, constitutional violations. The city does not assert that evidence of training or supervision policies must be particularly weighty or probative. Rather, it insists that such evidence, no matter how substantial, is simply irrelevant to a Section 1983 action. This view of *Monell* is expressly disavowed by the United States Conference of Mayors, the National League of Cities, and the National Association of Counties. These amici urge the Court to hold that a city "can be held liable under 42 U.S.C. Section 1983 for providing inadequate police training if a deprivation of constitutional rights results from a municipal policy of inadequate training."[6]

The policies for which *Monell* holds a municipality accountable are the official actions or practices that establish the operative rules of action which guide the conduct of subordinate employees. A city policy is important to those employees and to the private citizens whose rights may be at stake, only because, and to the extent that, the policy actually determines how city workers will in fact act. In *Pembaur* v. *Cincinnati*, 106 S.Ct. 1292 (1986), the

[6] Brief Amicus Curiae of U.S. Conference of Mayors, *et al.*, p. 5 (hereinafter cited as "Mayors' Brief").

opinion of the county prosecutor that force should be used to execute a capias led to the injury complained of, and the resulting liability, only because that opinion was communicated to the deputy Sheriff waiting outside Dr. Pembaur's door. It is with the establishment of such rules of conduct, not with the writing of words in a ledger destined to gather dust on some obscure shelf, that *Monell* is concerned.

Municipal policy may be communicated to subordinate officials in a variety of ways. A rule of general application may be issued in writing as part of a memorandum referred to and relied on by city workers in situations to which it applies, as occurred in *Monell* itself. Policymaking officials may issue a specific directive to the subordinate employees who will take the ultimate action, as occurred in *Pembaur*. But these are clearly not the only means by which city policy directives can be brought to the attention of city workers. The same information and guidance might be incorporated into the instructions given to workers when they are first hired or promoted into a particular position. City policies might be also made part of the standards which are utilized by supervisors in meting out discipline and promotions. Training and supervision are at least as important a part of the process by which a city makes and announces policy as the written memorandum in *Monell* or the telephone call in *Pembaur*.

For some municipal employees, training and supervision are virtually the exclusive manner in which a city announces and implements its policies. City workers holding desk jobs, like the plaintiffs in *Monell*, may often be able to refer in their day to day work to manuals, or memoranda. But other workers, particularly police officers, cannot be guided in this manner. They are not able to carry rule books with them on their rounds, and would

often lack the time to consult such materials if they had them. Direct consultation with policymakers, like that obtained by the deputies in *Pembaur*, will rarely be feasible. Virtually the only manner in which a city can make and implement its policies regarding the conduct of police officers is by instructing those officers how to act when they are on the street and by making clear what conduct will and will not lead to disciplinary measures. A finder of fact which, pursuant to *Monell*, undertakes to ascertain a city's policy must look primarily to the instructions and authorizations given to the relevant city employees. Where those employees are police officers, the material instructions and authorizations will frequently, if not ordinarily, be found in the substantive training and supervision practices.

Monell imposes liability for city policies that authorize unconstitutional conduct, as well as policies which require such conduct. The state and city policies in *Tennessee* v. *Garner*, for example, permitted police offices to use lethal force against nonviolent fleeing felons, but did not obligate the police to do so. 105 S.Ct. 1694 (1985). Under some circumstances, a city's failure to prohibit certain conduct might reasonably be understood as authorizing that action. Thus, if a city's only restriction on the use of lethal force against fleeing suspects forbad its use in the case of misdemeanants, that directive could be fairly construed as authorizing the use of lethal force against all fleeing felons, violent or otherwise. A city's official silence with regard to a particular action will not necessarily indicate or signal approval of that practice. But in the case of training, as is true of other methods of announcing and implementing policy, what instructions are not given will at times be an important indication of the substance of city policy.

Imposition of municipal liability based on training or supervision is consistent with the normal rules of agency. When the rule of *respondeat superior* is inapplicable, a principal is still under a duty to exercise reasonable care in the selection, training, instruction and supervision of its agents.[7] That agency principle was well established when Section 1983 was originally adopted in 1871, and application of that principle under *Monell* was expressly approved by the plurality opinion in *Tuttle*. 105 S.Ct. at 2434 n.5. Of course, the actions said to violate that duty and to have caused the constitutional violations complained of, must be the acts of a city policymaker authorized to make the relevant policy. But where the violation of that duty may fairly be attributable to the city, there is no reason to think that the framers of Section 1983 intended to establish any standard of care or definition of proximate causation different than the standard and definition applicable to other principals.

The doctrine proposed by the City of Springfield would lead to a number of incongruous results. For instance, under the proposed rule, the City of Cincinnati could have avoided liability in *Pembaur* if the county prosecutor, instead of telephoning his directions to the deputies outside Dr. Pembaur's door, had gone earlier to a training session and instructed *all* city and county police and deputies to use force in such a situation, because his actions would have then been protected from Section 1983 liability as "training." Similarily, petitioner's argument suggests that New York City could with impunity adopt a supervisory practice of firing all payroll clerks who wrote

---

[7] *Restatement (Second) of Agency*, Section 213 (1958): "*Principal Negligent or Reckless;*" *see also Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 694 n.58 (1978).

paychecks to pregnant city workers, so long as there was no policy that literally required pregnant workers to take unpaid leaves. A rule distinguishing training and supervision from other municipal practices under *Monell* would simply provide an incentive for cities to formulate and implement constitutionally suspect policies through training and supervision practices rather than through other means.

Petitioner urges in the alternative that a city policy which foreseeably causes a constitutional violation cannot lead to municipal liability unless that policy itself is unconstitutional. This argument is not limited in its significance to training or supervision policies. The city appears to suggest that the same doctrine could also immunize a city from liability for a formal written directive that was issued by official policymakers and that foreseeably caused a constitutional violation. The United States Conference of Mayors expressly disavows this contention, urging that a city may be held liable in some circumstances for constitutional violations caused by a policy that is not itself unconstitutional.[8]

Petitioner's argument faces several insurmountable legal and practical problems. The first difficulty is the language of Section 1983 itself. That statute imposes liability on "any person who, under color of law . . . shall subject, *or cause to be subjected*, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." (emphasis added). The statute clearly contemplates that the defendant might become liable in either of two ways: by directly violating a plaintiff's constitutional rights, or by "causing" a third party to do so. *Monell* itself recognized

[8] Mayors' Brief, pp. 5, 9.

the existence of this second ground of recovery, noting that "Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort. . . ." 436 U.S. at 692. *Monell* concluded that Section 1983 "clearly imposes liability on a government that, under color of some official policy 'causes' an employee to violate another's constitutional rights." 436 U.S. at 692.

This second type of liability would unquestionably apply in a Section 1983 action against an individual defendant. If a city police chief, to whom responsibility for making city law enforcement policy had been delegated, adopted a practice of hiring or retaining on the force individuals with a known penchant for excessive and unprovoked violence, the police chief himself would certainly be liable when that practice led to inevitable abuses by the officers involved. Similarly, if the chief directed that new officers be taught to do all in their power to capture fleeing felons, and directed that the training curriculum contain no mention of the constitutional restrictions announced in *Tennessee* v. *Garner*, 105 S.Ct. 1694 (1985), the chief would certainly be held legally responsible if one of the officers so trained proceeded to kill a fleeing non-dangerous felon. Petitioner suggests that where an official constitutional policy foreseeably causes a constitutional violation, the policymaker, but not the city should be held liable. (Pet. Br. 14-15.) But it is inconceivable that either the framers of Section 1983, or this Court in *Monell*, intended that where a municipal policy foreseeably and directly causes a constitutional violation, only the official policymaker, but not the municipality itself, could be sued for damages.

The city claims to find support for this sweeping departure from the rule in *Monell* in the language of the plurality decision in *Tuttle*. That opinion, however, merely

stated that in cases where the *only* evidence of a constitutional violation was a "single incident of unconstitutional activity," proof that the violation was caused by an existing unconstitutional policy would also be required. *City of Oklahoma City* v. *Tuttle*, 105 S.Ct. at 2436. The Court did not announce a requirement that an unconstitutional policy must underlie every failure to train claim. The plurality explicitly held that a claim can be made out "where the policy relied upon is not itself unconstitutional." *Id.* at 2436. The three concurring justices explicitly rejected the bifurcation of the constitutional inquiry as unncessary:

> I do not understand, nor do I see the necessity for, the metaphysical distinction between policies that are themselves unconstitutional and those that cause constitutional violations. See, *ante*, at 15, and n.7. If a municipality takes actions—whether they be of the type alleged in *Monell*, *Owen*, or this case—that cause the deprivation of a citizen's rights, Section 1983 is available as a remedy.

Id. at 2441, n 3 (Brennan, J. concurring), *see also Fiacco* v. *City of Rensselaer, N.Y.*, 783 F.2d 319 (2d Cir. 1986).

This focus on causation carries into effect the remedial purpose of the statute, which, by its language, seeks to place responsibility on the "person who . . . causes" the constitutional deprivation. It is also harmonious with the conclusion of the Court in *Monell* that municipal liability for acts of municipal employees should be limited to those instances where the city is actually at fault. *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 681 (1978). "In a case in which the plaintiff carries this burden, the city's liability would be mandated by the language, the legislative history, and the underlying purpose of Section 1983." *City of Oklahoma City* v. *Tuttle*, 105 S.Ct. at 2439. (Brennan, J. concurring).

As a theoretical matter, the distinction proposed by petitioner between an unconstitutional city policy, and a city policy which merely causes a constitutional violation by city employees, is far from obvious. The constitutional decisions of this Court delineate what actions are and are not constitutional, but have not heretofore attempted to delineate when a policy might be so connected with an unconstitutional action as to render the policy itself unconstitutional. An unconstitutional shooting forbidden by *Garner* might be caused by any of the following: (1) a policy of requiring police officers to shoot non-violent fleeing felons, (2) a policy of training police officers to shoot non-violent fleeing felons, (3) a policy of authorizing police officers to shoot non-violent fleeing felons, (4) a policy of training police officers that they must catch all non-violent fleeing felons, with no limitation placed on the means to be utilized, (5) a policy of not disciplining police officers who shoot non-violent fleeing felons. Which if any of these policies, as distinguished from any resulting shootings, is itself unconstitutional is at best obscure. Petitioner appears to urge that (1) and (3) are unconstitutional,[9] but neither petitioner nor the past decisions of this Court provide any principled basis for that or any other rule. What is clear is that all of these policies would have the same result, encouraging police officers to use precisely the degree of lethal force forbidden by *Garner*. Thus, adoption of an interpretation of *Monell* that distinguishes among such policies will inevitably provide municipalities with an opportunity and invitation to achieve unconstitutional ends through methods that immunize cities from liability.

---

[9] Pet. Br. 11 (unconstitutional policy in *Garner* of allowing use of excessive force).

Under the principles advanced by petitioner, a city could give a badge and a gun to any citizen and place him or her at large without any effort whatever to explain either the constitutional rules which any police officer must obey, the laws of the state at issue, or the degree of care necessary to avoid unprovoked killing of innocent civilians. Petitioner here does not purport to defend such a constitutionally outrageous policy, yet the decisions of the lower courts make clear that cities and counties have done precisely that.[10] We do not suggest that a *Monell* action should become a seminar in the finer nuances of police technique. But the appropriate limitations on municipal liability should be found in the doctrines of foreseeability and proximate cause that would have been familiar to the Congress that adopted the Civil Rights Act of 1871, not in a novel and ill-defined body of caselaw fashioned over a century later.

(C) The Scope Of A Monell Training Claim

The amicus United States Conference of Mayors suggests a variety of types of evidence that might support a claim that a constitutional violation had been caused by a municipality's training policies. Among the types of evidence the amici describe as probative are proof regarding the amount of time and effort devoted to a training program, proof of specific alleged deficiencies and expert testimony regarding whether a particular program was so deficient as to cause a specific constitutional violation.[11] The Conference also suggests that a pattern of police misconduct might be so severe and widespread as to compel the conclusion that only the city's training and

[10] Mayors' Brief, pp. 17-18.

[11] Mayors' Brief, pp. 11, 19.

supervision policies could have been at the root of those abuses.[12] We agree that these factors, although not constituting an exhaustive list of all possibly relevant evidence, would certainly warrant consideration in a *Monell* training case.

The city, however, urges the Court to adopt two *per se* evidentiary rules. First, petitioner asks the Court to hold that a *Monell* training claim must be based in every case on expert testimony. (Pet. Br. 25.) Although such testimony might well be offered by either party, its introduction will rarely be essential. In many cases, a jury will have no difficulty in ascertaining the likely consequences of a particular training policy. If police trainees are instructed that they are authorized to break and enter without warrants, or if their instruction is devoid of any references to the requirements of the Fourth Amendments, a jury could certainly infer, without any need for expert testimony, that such instruction had caused a subsequent unconstitutional search and seizure.

Petitioner suggests, somewhat more plausibly, that the plaintiff in a training case ought to identify the specific deficiency in the training program alleged to have caused the constitutional violation at issue. In any training case, of course, the subject matter of the allegedly deficient instructions will ordinarily be apparent from the nature of the constitutional violation that training is claimed to have caused. (Pet. Br. 24.) Where a city has a well-structured and documented training program, it may well be possible to ascertain directly and with a substantial degree of accuracy what instructions were given to new employees. In the case of a less formal program, on the other hand, where information may depend largely on the

[12] *Id.* p. 12, n.10; p. 15 n.12.

subjective testimony of possibly interested police officials, inquiry into the substance of the program will usually elicit little more than self-serving declarations of thoroughness. The manner in which police officers act after the period of instruction may, as the Conference of Mayors notes, be highly probative evidence of the substance of those instructions. (Mayors' Brief. p. 12 n.10.) Defendants as well as plaintiffs remain free to adduce whatever evidence bears on this issue. If, for example, a plaintiff sought to use a pattern of police abuse to prove that cadets were instructed to disregard the Fourth Amendment, a municipality could attempt to rebut the evidence with testimony by those who had issued the relevant instructions.

Petitioner argues, finally, that a training policy which causes a constitutional violation cannot result in municipal liability unless the policy was adopted with an intent to cause that violation. (Pet. Br. 15-20.) The Conference of Mayors asserts that a plaintiff must prove that the adoption of that policy was so grossly negligent as to amount to deliberate indifference to the constitutional rights at stake. (Mayors' Br. 15-20). Both petitioner and the Conference of Mayors attack the jury instruction in this case, which authorized the jury to award damages against the city if its training policies were grossly negligent.

We do not believe this issue is properly before the Court. Petitioner expressed no objection to the instruction at issue during trial, and petitioner's own proposed instruction would also have advised the jury that it could base liability on gross negligence. (See pp. 11-13 *supra*). In the Court of Appeals, the city expressly advocated a gross negligence standard in both its brief on the merits and its post-*Tuttle* reply brief. Petitioner can make no claim that this issue was fairly encompassed by its petition to this Court. Neither the questions presented nor the body of the petition make any reference to the instruction that petitioners now attack; the sole reference in the petition to gross negligence clearly accepts it as the appropriate standard. (Pet. p. 51.) All parties having proceeded at trial on the basis of a gross negligence standard, the law of the case should not be redetermined at this late date.

Although respondent acquiesced to the use of a gross negligence instruction at trial, and thus must prevail even if that heightened level of negligence is adopted as the correct standard, in the event the Court now chooses to address the issue, we would urge that no requirement beyond simple negligence be imposed as a matter of constitutional law in all *Monell* training cases.

Petitioner's approach to the question ignores the distinction between the duty of care owed by a municipality, on the one hand, and the requirement of something more than mere negligence on the part of a municipal employee before a "deprivation" can be established, on the other. *Daniels* v. *Williams*, 106 S.Ct. 662 (1986). In any other type of Section 1983 action a plaintiff need only prove that a defendant's conduct entailed an unreasonable risk of causing the constitutional violation that resulted, i.e., simple negligence. This ordinary tort standard would apply, for example, in an action against supervisory officials whose instructions allegedly caused a constitutional violation and the same standard, presumably, would apply as well to an action asserting that a city policy other than a training policy had caused a constitutional violation. Utilization of a lesser standard of care for municipal training policies would, for the reasons explained earlier, create an incentive for municipalities to encourage constitutionally suspect practices through training pro-

grams, rather than through other means, and would require the courts to attempt to distinguish between unconstitutional training policies and training policies which merely caused unconstitutional conduct, since only the latter would be subject to the proposed special standard. Thus, adoption of a dual standard of care would entail precisely the practical problems involved in the contentions discussed in part I(A).[13]

The legislative history of the 1871 Civil Rights Act makes clear that Congress believed that liability should be imposed on a city, or any other defendant, for simple negligence which resulted in a constitutional violation. Having rejected the proposal for strict vicarious liability embodied the Sherman Act, the Forty-second Congress then expressly approved the use of a negligence standard to delineate when a city might be held liable for abuses

---

[13] The Conference of Mayors argues that a special standard of proof in training cases is required by *Daniels* v. *Williams*, 106 S.Ct. 662 (1986) and *Davidson* v. *Cannon*, 106 S.Ct. 668 (1986). *Daniels* and *Davidson* hold that to prove a violation of the Due Process Clause a plaintiff must prove that deprivation of his life, liberty or property was caused by more than mere negligence by the government employee responsible for the deprivation. In this case, of course, officer Perry admittedly intended to kill Thurston; thus the requirement of *Daniels* and *Davidson* is clearly satisfied.

The requirement of proof of a more aggravated degree of negligence, and the notion that the existence of a state remedy may bar a Section 1983 action altogether, has been recognized as inapplicable to cases such as this one, where the unreasonable use of deadly force to effectuate an arrest implicates Fourth Amendment considerations. *Tennessee* v. *Garner*, 105 S.Ct. 1694, 1699 (1985); *Gilmere* v. *Atlanta*, 737 F.2d 894 (11th Cir. 1984), *rev'd*, 774 F.2d 1495 (11th Cir. 1985) *cert. denied* 106 S.Ct. 1993 (1986); *Depew* v. *St. Mary's*, 787 F.2d 1496 (11th Cir. 1986). Petitioner's passing reference to the availability of a state cause of action for wrongful death therefore has no bearing on the standard of care in this case. (Pet. Br. p. 70, n.9.)

occurring within its borders. Section 6 of the 1871 Act imposed liability on persons who, "having the power to prevent" the deprivation of federal rights by a third party, "shall *neglect* or refuse to do so" (emphasis added); damages were measured by the amount of injury which "reasonable diligence could have prevented." 17 Stat. 15 (1871). If, as *Monell* held, the general nature of a city's exposure to liability under Section 1983 is to be measured by the city's degree of exposure for failure to prevent abuses by the Ku Klux Klan, 436 U.S. at 692 n.57, then the requirement of "reasonable diligence," and the imposition of liability for "neglect," are likewise appropriate where a city's own actions have caused a constitutional violation by its own employees.

The plurality opinion in *Tuttle* emphasized that *Monell* contemplated "a fault-based analysis for imposing municipal liability." 105 S.Ct. 2434. *Monell's* rejection of *respondant superior* was intended to make clear that "municipal liability should not be imposed when the municipality was not itself at fault," 105 S.Ct. 2433, or "where no wrong could be ascribed to municipal decision makers." 105 S.Ct. at 2435. The common law standard of negligence, the taking of an unreasonable risk of causing a foreseeable injury, was the traditional standard of "fault" by which civil liability, in 1871 as today, was imposed. *The Nitroglycerine Case*, 82 U.S. 524, 538 (1872); *Railroad Co.* v. *Jones*, 95 U.S. 439 (1877). It is true that "some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter." *City of Oklahoma City* v. *Tuttle*, 105 S.Ct. at 2436 (plurality opinion). But those limitations should be found in the common law principles of reasonable care and proximate causation, principles familiar to and accepted by the

framers of the 1871 Civil Rights Act, rather than in the sort of special *ad hoc* rules which petitioner proposes.

II. *CITY OF OKLAHOMA CITY* v. *TUTTLE* DOES NOT REQUIRE A REVERSAL OF THE JUDGMENT BELOW.

In *City of Oklahoma City* v. *Tuttle*, the jury was expressly instructed that it could infer the existence of inadequate training or supervision from the occurrence of "a single, unusually excessive use of force." 105 S.Ct. at 2431. This Court held that that instruction was erroneous. The plurality opinion reasoned that to impose liability solely on that basis would in some instances "be to impose it simply because the municipality hired *one* bad apple." 105 S.Ct. 2435 (emphasis added). Justice Brennan, in a concurring opinion, rejected the *Tuttle* instruction on the same ground:

> A *single* police officer may grossly, outrageously, and recklessly misbehave in the course of a single incident. Such misbehavior may in a given case be . . . attributable to numerous other factors for which the city may not be responsible; the police officer's own unbalanced mental state is the most obvious example.

105 S.Ct. at 2440 (emphasis added).

In the instant case, of course, the trial judge did not give an instruction similar to that in *Tuttle*. On the contrary, although he did not have the benefit of the *Tuttle* decision, the trial judge laid out precisely the interdiction against a finding of municipal liability based on a single incident of excessive force:

> The City of Springfield is the employer of police officers, but the City cannot be held liable merely because the police officers involved are its employees.

> An incident of excessive force on the part of police officers standing by itself, is *insufficient to find* the City of Springfield liable under Section 1983. A governmental body can be found responsible for the deprivation of a person's civil rights if the actions taken by its employees, are in accordance with a custom or practice of the government and those actions caused the deprivation of the person's rights.

(A. 234) (emphasis added). (the entire charge with respect to municipal liability (Tr. 935-937) is set out in the addendum to this brief.)

"[T]he theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them." *City of Los Angeles* v. *Heller*, 106 S.Ct. 1571 (1986). The instruction in this case precluded the jury from imposing liability "solely" on the basis of a single brutal act by a single policeman, the very possibility that required reversal in *Tuttle*. 105 S.Ct. at 2441. Rather, the jury was permitted to draw proper inferences from all of the evidence, including testimony concerning the activities of all of the policemen involved in the chase, testimony concerning training and policy, and the jury's own interpretation of documentary evidence and things seen on the jury view.

From this evidence, the jury could have inferred that eight or more[14] police officers had taken part in a chase

---

[14] The amicus Conference of Mayors suggests that the jury must have found that the officers other than Perry acted properly, since it imposed liability on Perry alone. But it is at least as likely that the jury awarded no damages against the first two officers who shot at Thurston because their shots missed, and this caused no injury. In the case of the officers who beat Thurston after he was shot, the judge dismissed the claims against them on the ground that Thurston could not have suffered from those beatings because he was already unconscious from a bullet in his brain. (Tr. 636-37, 772.)

during which they fired at least[15] four shots at Thurston in three separate shootings, and then participated in two subsequent beatings. Troy fired at least once at Thurston's car at the corner of Memorial Drive and Roosevelt Avenue, while another officer broke his nightstick over the windshield. Thurston was, by all accounts, driving about 25 miles per hour at the time. (Tr. 530, 555.) Schaub fired at the car at the intersection of Bay and Roosevelt, and Perry fired two shots at the end of the chase. Risch, who was the first police officer to begin chasing Thurston, was also the first to club him at the end of the chase. The police officers participating in the second beating, observed by a civilian, were never identified.

More importantly, other evidence took the case clearly outside the ambit of the "single incident" rule by providing direct evidence bearing on deficient training. Police officers testified that they had virtually no instruction in how to stop a fleeing suspect beyond being told to turn on their lights and siren, and stand in the street and put up their hands. (Tr. 383-385, 566.) Firearm proficiency in the department was sufficiently lax that the former head of the Police Academy testified he would fear for his life if certain officers from the force came into his office with a loaded weapon. (Tr. 189.) These admissions bolstered the probative value of testimony about conduct of the officers in this case which "could be viewed as evidence of the

[15] Ballistics evidence at trial was inconclusive regarding the total number of shots fired. (Tr. 131.) Although Schaub only admitted to firing one shot at Bay and Roosevelt, Etter thought she heard three shots at that intersection. Perry only fired twice, but Kimberly Fowlkes reported hearing three or four shots at the end of the chase. (Tr. 82.) Perry was certain the bullet in Fowlkes' door was fired by someone other than himself or Schaub. (Tr. 285.)

inadequacy of the City's police training." (Mayors' Brief, pp. 13-14, n.11.)

Petitioner urges this Court to hold that, as a matter of law, a series of unconstitutional attacks on the same victim in the course of a pursuit can never be considered by a jury as part of the evidence supporting a finding of municipal liability, no matter how many officers were involved.[16] The eight or more officers who may have engaged in constitutional violations in this case constituted a significant portion of the Springfield police force. Under the city's view, however, the evidence would have been insufficient even if every member of the police department had shot at or beaten the decedent.

Nothing in *Tuttle* supports the adoption of any such *per se* evidentiary rule. The plurality and concurrence in *Tuttle* both agreed that misconduct by a single officer was not probative by itself because it was always possible that one officer was "a bad apple" or "mentally unbalanced." But the likelihood that a city would have several mentally unbalanced officers is significantly lower, and the likelihood that all of those "bad apples" would happen to be on duty at the same time and place, and thus be in a position to mistreat the same victim, is extremely small. The probative value of the evidence aggregated in this case on the issue of custom or practices of the police department with regard to the use of deadly force in the course of an arrest is correspondingly greater than that provided by the "single incident" in *Tuttle*. If the jury in this case found that three or four different officers had used unconstitutionally excessive force in shooting at and beating

[16] Petitioner acknowledges that a city could be held liable if responsible city supervisory officials knew of, and failed to stop, a pattern of misconduct. (Pet. Br.21-22.)

Thurston, the jury certainly could consider this evidence as part of its substantial basis for concluding that Springfield's law enforcement policies, rather than a chance coming together of several mentally unstable officers, was the cause of those constitutional violations.

The *per se* rule proposed by petitioner would lead to a number of incongruous results. Petitioner apparently agrees that a jury could impose liability based on two or more incidents occurring on different evenings. Thus, in the city's view if officers Troy, Schaub and Perry had shot at Thurston and missed on September 25, 26 and 27, 1981, respectively, the verdict could be upheld. Reversal is required here according to petitioner, because all three officers shot at Thurston on the same day, September 28, 1981. Similarly, although the improper actions of two separate officers on different days could support a finding of municipal liability, in the city's view misconduct by five or ten officers would be legally insufficient if that misconduct occurred during the same "incident."

Certainly the interconnected misconduct of two or more officers during the course of a joint attack may in some circumstances be of less probative weight than misconduct by the same number of officers during totally unrelated incidents. The misconduct of one officer, for example, may mislead his or her colleagues as to the identity or dangerousness of his or her victim. The manner in which the acts of multiple defendants are causally related to one another, as well as to the harm suffered by a victim, is traditionally a matter for determination by a properly instructed jury. Keeton, *Prosser and Keeton on Torts* 319-321 (5th Ed. 1984). Whether or not the strength of a plaintiff's case is diminished by such interconnections is a matter for the jury, and in some cases the court, to evaluate in light of all the other relevant evidence. But the

possible existence of such interconnections does not justify the sort of *per se* rule proposed by petitioner. The jury was entitled to consider the conduct of all of the police officers involved in the Thurston arrest, together with testimony about the training, or lack of training, which they had been provided by the city for dealing with such a situation. Nothing in *Tuttle* is to the contrary.

III. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY VERDICT

(A) The Standard Of Review

The Seventh Amendment severely restricts the extent to which the verdict of a properly instructed jury may be reviewed by a federal court. In assessing the sufficiency of the evidence on which a jury based its verdict, neither a trial judge nor the appellate courts are free "to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other conclusions are more reasonable." *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944).[17] A case must be submitted to the jury "[i]f evidence might justify a finding either way . . ." *Wilkerson* v. *McCarthy*, 336 U.S. 53, 55 (1949), and "fair-minded men might reach different conclusions," *Bailey* v. *Central Vermont R. Co.*, 319 U.S. 350, 353 (1943). A directed verdict is inappropriate except in the extreme case in which there is only one reasonable conclusion that a jury could possibly draw. In assessing a request for a directed verdict or judgment notwithstanding the verdict, the courts are required "to view the

---

[17] See also *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946) ("it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.")

evidence in the light most favorable to [the opposing party] and to give it the benefit of all inferences which the evidence supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co.* v. *Union Carbide, Co.*, 370 U.S. 690, 696 (1962).[18]

"[W]here, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury." *Ellis* v. *Union Pacific R. Co.*, 329 U.S. 649, 653 (1947).[19] The resolution of conflicting evidence is equally a matter for the jury alone. "Where uncertainty . . . arises from a conflict in the testimony . . . the question is not of law but of fact to be settled by the jury." *Gunning* v. *Cooley*, 281 U.S. 90, 94 (1930).[20] "[T]he jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946). The drawing of inferences from both disputed

[18] See also *Anderson* v. *Smith*, 226 U.S. 439, 440 (1913) (court considering motion by defendant must adopt "the view most favorable to the plaintiff of the evidence"); *Kane* v. *Northern Cent. R. Co.*, 128 U.S. 91, 94 (1888) (opposing party to be given "the benefit of every inference to be fairly drawn from" the evidence); *cf. Pawling* v. *United States*, 8 U.S. (4 Cranch.) 219, 222 (1808) ("the testimony is to be taken most strongly against the moving party").

[19] *Ellis* v. *Union Pacific R. Co.*, 329 U.S. 649, 653 (1947) ("[T]he decision as to which witness was telling the truth . . . [is a] question [] for the jury"); *Lavender* v. *Kurn*, 327 U.S. 645, 652 (1946) ("[I]t would be an undue invasion of the jury's historic function for an appellate court to . . . judge the credibility of witnesses . . ."); *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944) ("It is the jury, not the court, which . . . judges the credibility of witnesses . . .")

[20] See also *Ellis* v. *Union Pacific R. Co.*, 329 U.S. 649, 643 (1947); *Lavender* v. *Kurn*, 327 U.S. 645, 652 (1946); *Bailey* v. *Central Vermont R. Co.*, 319 U.S. 350, 353 (1943); *Richmond & Danville Railroad Co.* v. *Powers*, 149 U.S. 43, 45 (1893).

and uncontroverted testimony is also ordinarily a matter for the jury.[21]

> It is the jury, not the court, which . . . draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.

Tennant v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944).[22]

The application of *Monell* frequently requires, as it did here, that the finder of fact resolve conflicting evidence and draw inferences regarding policies, customs, causation, and the delegation of authority. But nothing in *Monell* suggests that the factual issues made critical by that decision are to be resolved by judges rather than juries. There is "no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such

[21] *Ellis* v. *Union Pacific R. Co.*, 329 U.S. at 653 ("[I]t would be an invasion of the jury's function for an appellate court to draw contrary inferences. . . ."); *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 68 (1943)) (where "fair-minded men may draw different inferences,' the case should go to the jury.")

[22] "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge." *Sioux City & Pacific R.R. Co.* v. *Stout*, 84 U.S. 657, 664 (1874).

questions as these as well as all others." *Jones* v. *East Tennessee V. & G.R.Co.*, 128 U.S. 443, 446 (1888).

Deference to the preeminent role of the jury is particularly appropriate in actions such as this seeking redress for unconstitutional conduct by government officials. The resolution of a case such as this necessarily strikes an often difficult balance between protection of the municipal fisc and preventing unconstitutional conduct by local government. No group is better suited to strike that balance than a jury comprised of residents of the district in which an alleged constitutional violation is claimed to have occurred. It is such jurors who, as taxpayers, must ultimately bear the cost of any award, and it is such jurors who, as residents of the locality involved, will be at risk if violations of the constitution go unredressed and undeterred. Although the Seventh Amendment right to trial by jury extends to the most mundane commercial and tort litigation, the primary concern which led to the adoption of that guarantee was a desire to assure that in civil as well as criminal cases juries would protect and enforce the substantive rights guaranteed by the Constitution. The men who framed the Seventh Amendment were well aware of the critical role which civil juries had played in establishing the right against unreasonable searches and seizures.[23] Thomas Jefferson insisted that jury trials were "the only anchor yet imagined by man, by which a government can be held to the principles of its constitution."[24] The Virginia convention resolved that "in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and

[23] For a discussion of the infamous Wilkes case, and the resulting litigation, see, *e.g.*, G. Rude, *Wilkes and Liberty*, 17-37 (1932).

[24] *The Writings of Thomas Jefferson* 71 (Washington ed. 1961).

[ought] to remain sacred and inviolable."[25] The first draft of the Seventh Amendment also characterized trial by jury in civil cases as "one of the best securities to the rights of the people."[26]

In *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), Justice Rehnquist observed that the Seventh Amendment was adopted in part because its framers believed that juries would often be more vigilant than judges in enforcing fundamental liberties:

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny—a safeguard too precious to be left to the whim of . . . the judiciary. . . . . [T]he concerns for the institution of jury trial that led to the passages of the Declaration of Independence and to the Seventh Amendment were not animated by a belief that use of juries would lead to more efficient judicial administration. Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, and thus keep the administration of law in accord with the wishes and feelings of the community . . . Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.

439 U.S. at 343-44 (dissenting opinion). Where, as here, the vindication of fundamental rights and liberties is at issue, federal judges should be particularly reluctant to interfere with the institution which the Seventh Amendment contemplates will prevent, or provide redress for, violations of the Constitution. The First Circuit, recog-

[25] J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 658 (1856).

[26] Annals of Cong. 435 (1789).

nizing that the instructions in this case did not suffer from the infirmities present in *Tuttle*, analyzed the facts in accordance with the above principles. *Kibbe* v. *City of Springfield*, 777 F.2d 801, 806-807 (1st Cir. 1985). The panel there concluded that the evidence of events on the night Thurston was shot, taken together with testimony about the department's practice of giving "virtually no guidance in apprehending suspects in fleeing motor vehicles who ignored orders to stop," *Id.* at 807, and other evidence of departmental procedures, provided a sufficient basis for either a finding that Thurston's death was affirmatively linked to a grossly negligent failure to train police officers in alternative techniques, or from a policy of using deadly force "even though something less would have sufficed." *Id.* at 808.

B. Municipal Policy Regarding The Use of Lethal Force

The trial judge who heard this case did not understand the verdict to be based solely on a claim of inadequate training. Rather the district court concluded that the evidence also provided a substantial basis on which the jury could have found that the unconstitutional shooting of Thurston was both sanctioned by and consistent with the city's policy regarding the use of firearms. In rejecting the city's motion for judgment notwithstanding the verdict, the district judge emphasized:

> [T]he Springfield Police Department cleared defendant Perry of any wrongdoing in this matter. In fact, it found he had acted in accordance with the Department's own policy. However, it is not clear from the evidence why Perry fired: did he shoot Thurston because he knew Thurston was a dangerous fleeing felon, . . . or did he take unreasonably excessive action to protect himself from Thurston's swerving vehicle? If the latter is the case—and there was evidence from which a jury could conclude this—then Perry acted unconstitutionally pursuant to his department's own policies. (A. 46.)

If, as the trial judge believed, the jury verdict was based on a finding that Perry acted pursuant to city policy, most of the legal issues raised by petitioner would be of no relevance to the disposition of this appeal.

The district court correctly concluded that there was substantial evidence that city policy sanctioned the constitutional violation which occurred in this case. During the closing argument the Assistant City Solicitor who represented defendant Perry emphasized that the shooting had been thoroughly investigated both by the police department and at an inquest.[27] The transcript is replete with references to the fact that the Detective Bureau and the city's Internal Investigations Unit had visited the scene of the shooting, interviewed all the relevant witnesses,[28] and referred their findings to the Chief of Police.[29] There was direct testimony that Perry had been exonerated at the inquest.[30] In light of the fact that officer Perry had been permitted to continue as a motorcycle patrolman following that investigation,[31] the jury could certainly have concluded, as the trial judge believed it had, that the city had found Perry's action was entirely consistent with the department's policies. Under ordinary agency principles, that finding would have constituted substantial evidence of ratification.

---

[27] Tr. 1054.

[28] Tr. 144, 160-61, 225-26, 255, 447-49, 483, 484, 512-14, 795, 837, 899.

[29] Tr. 521.

[30] Tr. 162-63.

[31] Tr. 327.

The written Springfield rules authorized the use of deadly force under some circumstances which would not have been constitutional under the instructions given by the trial judge. These instructions were not objected to by the city below, and no attempt has been made to attack them now. The trial court instructed the jury that police officers could use deadly force to apprehend a violent fleeing felon who was likely to cause death or serious injury if not apprehended.[32] The written city rules also sanctioned the use of such force against individuals who had not engaged in any crime, but whom a police officer merely believed, possibly erroneously, might engage in violence.[33] Although the Springfield rules might have been construed to permit the utilization of deadly force only when necessary to stop a violent attack, none of the *defendants* construed the rules in that narrow manner. On the contrary, the defendants defended the use of deadly force by Perry as proper despite the fact that officer Perry testified that he was neither under attack, nor in any danger, so long as he did not attempt to drive abreast of Thurston's car.[34] Perry could readily have stopped the car by shooting at the tire,[35] or could have chosen to follow the car until it was stopped by a police roadblock. Instead Perry repeatedly sought to drive next to the Thurston car, expecting that Thurston would swerve and intending to shoot when that occurred. Perry justified the shooting solely on the ground that he was under attack when he

[32] Tr. 932-35.

[33] Pet. Br. 28-29 n.17.

[34] Tr. 262, 290, 291, 293, 297.

[35] *See* Tr. 372.

shot,[36] and testified that he had been instructed that he could deliberately place himself in danger, and then rely on that danger to use lethal force.[37] Despite those circumstances, Perry's superior officers defended the shootings as proper,[38] and the internal affairs investigator acknowledged he had not bothered to ask Perry why he did not attempt to stop the car by merely shooting out a tire.[39]

Respondent insisted that Thurston had never actually swerved at Perry, relying primarily on physical evidence from the scene of the incident.[40] But even the sequence of events described by Perry himself, and which Perry insis-

[36] Tr. 201, 266. Perry testified that he "didn't know if there may be another roadblock down the road" at which police officers might be endangered if Thurston was not stopped by the use of deadly force. (Tr. 334-345.) The Bay and Roosevelt roadblock had been set up just over the crest of a hill, giving Thurston only two or three seconds to swerve to avoid hitting a police cruiser when it came into sight. This is where Perry saw Schaub jump out of the open lane and fire his gun at Thurston. (Tr. 337-338.)

From "bits and pieces" of radio transmissions Perry could hear on his motorcycle radio, he knew only that Thurston was accused of "assaulting a female at a dwelling." (Tr. 329.) He did not know anything about an alleged abduction. (Tr. 331.) The transmission from the dispatcher regarding the possibility that Thurston might be armed was made after Perry had shot him. Exhibit D, Tape Recording of Dispatcher. (Tr. 208, 365-366.)

[37] Tr. 266. Perry's interpretation of the city's policies was of substantial importance. *Restatement (Second) of Agency*, Section 215, (1958) comment a ("If the agent reasonably misunderstands the principal's meaning which is ambiguous in light of the circumstances, and acts believing that he is carrying out the principal's instructions, the act is authorized.")

[38] Tr. 175-77, 211, *see also* Tr. 413.

[39] Tr. 514.

[40] Tr. 358-59, 302-03, 377.

ted were sanctioned by an authoritative interpretation of city rules, entailed a constitutional violation under the unchallenged jury instructions. Counsel for the individual defendants sought to avoid liability by asserting that those officers were merely obeying orders. The Assistant City Solicitor who represented officer Perry insisted that Perry had an absolute "duty and obligation" to stop Thurston's car and that Perry had not violated the city regulations.[41] The attorney representing officers Troy and Schaub insisted that all three of the officers who admitted having shot at Thurston had "complied fully . . . with every requirement in Rule 28. They did exactly *what they were supposed to do* and they did not violate any rules . . ." (Tr. 1029-30 (emphasis added).)

In this court, counsel for the city expressly disavows Perry's conduct, attacking his actions as apparent "misconduct," (Pet. Br. 22, 29), a "violation of the rules" (Pet. Br. 29, 30, 31), or even "murder" (Pet. Br. 7). But the city expressed no such misgivings at trial regarding Perry's actions. The city's attorney carefully avoided suggesting to the jury in any way that the shooting, even on plaintiff's interpretation of the facts, was contrary to city policy. This was clearly a deliberate tactical choice, for the city's answer to the original complaint had expressly asserted "At all times material each of the . . . defendants was acting in accordance with the rules and regulations of the Springfield Police Department." (A. 25.)

The attorneys for Perry, Troy, Schaub, and Risch evidently succeeded in persuading the jury that their clients were merely following orders. The jury returned a verdict in favor of Troy, Risch and Schaub, and awarded only $1 in compensatory damages and $500 in punitive damages

[41] Tr. 1043-1046.

against Perry. The verdict of $50,000 against the city unquestionably reflected the jury's conclusion that the primary responsibility for the constitutional violation lay with the city, which had formulated the policy which Perry was following when he killed Thurston. In retrospect, the city might have been well advised to argue at trial, as it has in this Court, that Perry had violated rather than obeyed city policy when he shot Thurston. But the city's attorney made a tactical decision not to advance any such contention, choosing instead to run the risk that, if the jury did find a constitutional violation had occurred, the jury would accept the defendant officers' contention, undisputed by the city itself, that the officers were all doing "exactly what they were supposed to do" under city policy. The city cannot now complain about the foreseeable consequences of its deliberate trial court strategy.

(C) Municipal Training Policy

Determination of respondent's training claim required the jury to resolve the sharply conflicting testimony regarding what actually occurred on the night of September 28, 1981. The city asserts in its brief that Thurston kidnapped and brutalized Etter, and then attempted to kill officers Troy, Schaub and Perry with his automobile. If the jury believed that version of the facts it probably would have neither sustained a training claim, nor have concluded that any constitutional violation had occurred. Respondent's version of the facts, on the other hand, if credited by the jury, would certainly have provided substantial support for her claim against the city.

Etter testified, first, that Thurston repeatedly shouted at the officers that he was driving to his sister's home, and would stop there.[42] Thurston was in fact driving towards

[42] Tr. 525, 855, 900.

his sister's house, and was finally shot and killed just around the corner from her home. If the jury found that the police knew this, the jury could well have concluded that the roadblocks, the police chase, and ultimately the shooting of Thurston itself were all entirely unnecessary, since the police knew they had only to await Thurston's arrival at the announced destination to arrest or question him. This conclusion would have also found support in direct testimony from the police officers themselves regarding their meager training with respect to stopping fleeing suspects and firearm training. (Tr. 189, 383, 345, 566.) Etter also testified that Thurston had not attempted to run over officers Troy and Schaub but had merely changed lanes to avoid hitting cars which those officers had parked in the lane in which Thurston was driving.[43] Counsel for petitioner repeatedly attacked Perry's assertion that Thurston had swerved at Perry's motorcycle, emphasizing in particular that, although Perry insisted Thurston's car was swerving when the shooting occurred, the car had rolled in a straight line down the road after Thurston was hit in the head.[44] The jury could have concluded that Thurston never attemped to injure any of the officers in question.

Respondent also offered evidence that the officers who shot at Thurston's car acted in willful disregard of the lives of innocent bystanders. Troy and Schaub admittedly

---

[43] Tr. 519, 524, 900. Etter's statement was corroborated by officer Troy. Tr. 559, 574. She stated that Thurston did not attempt to run over any police officers during this chase, but merely tried to drive around the cruisers that were blocking his way. She said that she saw the officers standing in the road with their guns in their hands. She stated that Thurston continued to shout at the police that, "I'll stop in a few minutes, I'm going to my sister's house." Exhibit 16 (Tr. 900.)

[44] Tr. 358-59, 302-03.

knew Etter was sitting in the moving car only inches from Thurston when they shot at that vehicle.[45] Similarly, although Troy, Schaub and Perry insisted that they had shot at the car in relatively deserted areas where there was no chance that a bullet which missed the car might strike any bystander,[46] respondent offered contrary evidence, including proof that one bullet actually struck an occupied private home.[47]

The events following the shooting also suggested a willful disregard for human life. Although Thurston was rendered immediately unconscious by the bullet in his brain, several officers beat Thurston while removing him from the car.[48] One of those officers offered the rather bizarre explanation that the unconscious victim was guilty of resisting arrest because he had failed to surrender his person after being shot in the head.[49] Although Thurston was taken to a hospital after the shooting, the hospital attendants were not told by the police that Thurston had been shot.[50] There was conflicting testimony regarding which officer or officers had withheld this information,[51] but it was clear that there was no training or regulation insuring that such information would be promptly reported to medical personnel.

---

[45] Tr. 406, 409-12.

[46] Tr. 300.

[47] Tr. 81-82, 145.

[48] Tr. 96, 104, 114, 135-37, 152, 319-20, 323, 440, 498, 499.

[49] Tr. 431-32, 505.

[50] Tr. 47.

[51] Tr. 34-6, 48, 138-40, 1454, 152, 155, 157, 180-85, 311, 503, 539, 549.

Finally, there was a considerable dispute regarding the manner in which Thurston had treated Etter. There was testimony, on the one hand, that Thurston had beaten Etter and then dragged her by her hair into the car.[52] Other witnesses testified, however, that Etter was not bruised at all after the incident,[53] and the suggestion that Etter had been kidnapped, was further contradicted by evidence that, once Etter reached the car, she offered to drive.[54] When a police officer approached the car while it was stopped at a traffic light, Etter made no attempt to call for help or to get out of the car itself.[55] The jury could have concluded that the police had good reason to believe that Etter was *neither* in any danger *nor* being held in the car against her will.

Depending upon which version of the sharply conflicting testimony the jury accepted—a decision which no doubt turned to a substantial degree on the credibility of the officers involved,[56]—the jury could have found either that Thurston was a dangerously violent man determined to kill police officers if necessary to make his escape, or that Thurston was a participant in a lover's quarrel whose only offense was a failure to stop when waved over by the police. If it believed respondent's account of the events of September 28, 1981, the jury could certainly have concluded that within the police force which Thurston encountered on that night the use of excessive and unprovoked violence was so widespread that it could only

---

[52] Tr. 658, 676, 685, 730, 731.

[53] Tr. 316, 391, 519.

[54] Tr. 849.

[55] *See* Tr. 463-470, 1068.

[56] Tr. 1066, 1070.

have been the result of the city's policies regarding the instructions and directions given to police officers.

CONCLUSION

For the above reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

TERRY SCOTT NAGEL
THOMPSON, NAGEL & THOMPSON
Suite 545
94 State Street
Springfield, MA 01103
(413) 781-4343
Attorney for Respondent

ADDENDUM

ADDENDUM

TRANSCRIPT PAGES 935 TO 937

* * * *

[935] Now the claim against the City of Springfield. The plaintiff Lois Kibbe has brought her claim of a civil rights violation against not only the individual police officers, but also the City of Springfield. A governmental body such as the City of Springfield can be found to be responsible for violations of a person's rights, under Section 1983 of Title 42 of the United States Code.

The City of Springfield is the employer of police officers, but the City cannot be held liable merely because the police officers involved are its employees. An incident of excessive force on the part of the police officers standing by itself, is insufficient to find the City of Springfield liable under Section 1983. A governmental body can be found responsible for the deprivation of a person's civil rights if the actions taken by its employees, are in accordance with a custom or practice of the government and those actions caused the deprivation [936] of the person's rights.

The custom or practice may be an official policy of the City; however, the custom or practice does not have to be authorized by written law, nor must it be the result of formal approval through official decision-making channels. It is enough that the customs or practices are so permanent and well-established, as to demonstrate implicit authorization or approval or acquiescence in the unconstitutional conduct. Where a city's failure to train, supervise, or discipline police officers is reckless or grossly negligent, and this failure constitutes a custom or practice of the city, then the city may be held liable under Section 1983.

If you are convinced by a preponderance of the evidence that Clinton Thurston was deprived of his civil rights by the actions taken by the defendant police officers then you must decide if

the actions taken were done in accordance with the custom or practice of the City of Springfield.

If you are convinced by a preponderance of the evidence that the officers acted in conformity with the City's custom or practice, and that this [937] custom or practice violated Clinton Thurston's civil rights, then you may find for the plaintiff and her claim against the City of Springfield. Obviously the reverse is true if you find this is not so, then you will find for the City in this claim.

* * * *

REPLY

BRIEF

(9)

Supreme Court, U.S.
FILED
OCT 25 1986
JOSEPH F. SPANIOL, JR
CLERK

No. 85-1217.

In the

Supreme Court of the United States.

OCTOBER TERM, 1985

CITY OF SPRINGFIELD, MASSACHUSETTS,
PETITIONER,

v.

LOIS THURSTON KIBBE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Brief for the Petitioner.

EDWARD M. PIKULA,
Assistant City Solicitor,
Counsel of Record,

RICHARD T. EGAN,
City Solicitor,
HARRY P. CARROLL,
Deputy City Solicitor,
SUSAN J. MCFARLIN,
Staff Attorney,

Law Department,
City of Springfield,
36 Court Street,
Springfield, Massachusetts 01103.
(413) 787-6085

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

16pp

Table of Contents.

I. The court should maintain a fault based standard for a *Monell* claim 1

A. An unconstitutional policy requirement maintains the fault based standard of *Monell* 2

B. Deliberate conduct or concious choice maintains the fault based standard required by *Monell* 4

II. A *Monell* claim should not be based on common law agency principles 6

III. The inferences on which the First Circuit allowed liability are improper 8

Conclusion 11

Table of Authorities Cited.

CASES.

Bigelow v. Inhabitants of Randolph, 80 Mass. (14 Gray) 541 (1860) 7

Buttrick v. City of Lowell, 83 Mass. (1 Allen) 172 (1861) 7

City of Oklahoma City v. Tuttle, U.S. , 105 S.Ct. 2427 (June 3, 1985) 2n, 3, 8n, 9

Coca Cola Bottling Co. of Black Hills v. Hubbard, 203 F.2d 859 (8th Cir. 1953) 2n

Davidson v. Cannon, 54 U.S.L.W. 4095 (1986) 5

Ebker v. Tan Jay Intern., Ltd., 739 F.2d 812 (2d Cir. 1984) 2n

Harris v. McRae, 448 U.S. 297 (1980) 6

Irwin v. Ware, 392 Mass. 745, 467 N.E. 2d 292 (1984) 7n

Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984) 7n

Johnson v. United States, 434 F.2d 340 (8th Cir. 1970) 2n
Kimball v. City of Boston, 83 Mass. (1 Allen) 417 (1861) 7n
Meritor Savings Bank v. Vinson, 54 U.S.L.W. 4703, 106 S.Ct. 2399 (1986) 6n
Molinari v. City of Boston, 333 Mass. 394 (1955) 7n
Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 1, 3, 4, 5, 6 et seq
Newport v. Facts Concerts Inc., 453 U.S. 247 (1981) 2n
Nickerson v. Commonwealth, 397 Mass. 476, 492 N.E.2d 90 (1986) 7n
Oeschger v. Fitzgerald, 2 Mass. App. Ct. 472 (1974) 7
Owen v. City of Independence, 445 U.S. 622 (1980) 7
Pembaur v. City of Cincinnati, 54 U.S.L.W. 4289 (March 25, 1986) 2n, 3, 4, 5, 7n et seq
Rizzo v. Goode, 423 U.S. 362 (1976) 6
Rochin v. California, 342 U.S. 165 (1952) 4n
Slaven v. City of Salem, 386 Mass. 885, 438 N.E.2d 348 (1982) 10
Springfield v. Kibbe, 777 F.2d 807 (1985) passim
Tennessee v. Garner, U.S. , 105 S.Ct. 1694 (1985) 3
Texas v. Brown, 460 U.S. 730 (1983) 4n, 5n
Thayer v. Boston, 36 Mass. (19 Pick.) 511 (1836) 7
United States v. Sharpe, 105 S.Ct. 1568 (1985) 9
Vippolis v. Village of Haverstraw, 768 F.2d 40 (2d Cir. 1985) 10
Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985), cert. denied, 106 S.Ct. 879 (1986) 6
Whitley v. Albers, 106 S.Ct. 1078, 89 L.Ed. 2d 251 (1986) 5n
Williams v. Daniels, 54 U.S.L.W. 4090 (1986) 5

PROVISIONS.

42 U.S.C. § 1983 passim
42 U.S.C. § 2000e(b) 7n

United States Constitution
Fourth Amendment 4n, 5n
Eighth Amendment 5n
Fourteenth Amendment 4n, 5n, 7n

Federal Rules of Civil Procedure
Rule 51(a) 2n

MISCELLANEOUS.

9 Wright & Miller, Federal Practice and Procedure: Civil § 2537 2n

No. 85-1217.

In the
Supreme Court of the United States.

OCTOBER TERM, 1985

CITY OF SPRINGFIELD, MASSACHUSETTS,
PETITIONER,

v.

LOIS THURSTON KIBBE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Brief for the Petitioner.

I. THE COURT SHOULD MAINTAIN A FAULT BASED STANDARD FOR A *Monell* CLAIM.

Plaintiff suggests "the City urges this Court to fashion a broad exception" to the principles set forth in *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978) (Resp. Br. 14). Contrary to plaintiff's suggestion, the City urges the Court to uphold *Monell* not "fashion a broad excep-

tion" to it. A policy must be unconstitutional to provide fault based § 1983 municipal liability. Municipal policy is established by conscious choice or deliberate conduct, not gross negligence. The standard of culpability for a Due Process violation is deliberate conduct.[1] The City's position is consistent with this Court's prior decisions approving § 1983 municipal liability only when the deprivation was pursuant to an official policy.

A. *An Unconstitutional Policy Requirement Maintains the Fault Based Standard of* Monell.

Plaintiff erroneously contends that past decisions of this Court do not provide "any principled basis" for distinguishing between constitutional and unconstitutional municipal policy (Resp. Br. 21). This Court has affirmed or approved § 1983 municipal liability only when proof of the incident included proof that it was caused by an existing unconstitutional policy

[1] Although plaintiff suggests these issues were not preserved pursuant to Fed. R. Civ. P. 51 (a) (Resp. Br. 24), this objection was waived since it was not raised in opposition to the petition for certiorari. *City of Oklahoma City* v. *Tuttle*, U.S. , 105 S.Ct. 2427, 2432 (June 3, 1985). See also, *Newport* v. *Facts Concerts Inc.*, 453 U.S. 247, 258 (1981).

Additionally, "A proper motion for a directed verdict and its denial will always preserve for review the question whether under the law truly applicable to the case there was an adequate evidentiary basis for the submission of the case to the jury." *Coca Cola Bottling Co. of Black Hills* v. *Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953). *Ebker* v. *Tan Jay Intern., Ltd.*, 739 F.2d 812, 825-826 n.17 (2d Cir. 1984). See, 9 Wright & Miller, Federal Practice and Procedure: Civil § 2537 n.40 at 599-600.

Further, a change in the law subsequent to a trial court's decision and prior to a determination on appeal allows consideration of the issues. *Johnson* v. *United States*, 434 F.2d 340, 342-344 (8th Cir. 1970). In this case, the City's motion for judgment n.o.v. was denied December 21, 1984 (App. 6) and the City appealed January 17, 1985 (App. 7). Thereafter, this Court decided *Tuttle*, *supra* (June 3, 1985) and *Pembaur* v. *City of Cincinnati*, 54 U.S.L.W. 4289 (March 25, 1986).

attributed to a municipal policymaker. *Monell, supra, Tennessee* v. *Garner*, U.S. , 105 S.Ct. 1694 (1985), *Pembaur, supra*. This Court has not approved § 1983 municipal liability where a nonpolicymaker, contrary to official municipal policy, commits an unconstitutional act. The First Circuit's approval of liability without proof that the incident "was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker", expands municipal liability beyond the limits in *Monell*. *Tuttle*, 105 S.Ct. at 2436.[2]

If a nonpolicymaker, acting pursuant to training authorized by municipal policymakers, unconstitutionally uses deadly force against a nondangerous fleeing felon,[3] *Monell* liability could attach.[4] Liability should not attach if no unconstitutional policy is shown. The First Circuit specifically rejected plaintiff's contention in this Court that the City had a policy to use deadly force "even though something less would have sufficed" (Resp. Br. 38). The First Circuit stated that such a policy was "not proven sufficiently or linked sufficiently to the harm to impose municipal liability". *Kibbe*, 777 F.2d at 809.

Justice Powell, concurring in *Monell*, noted "[t]here are substantial line-drawing problems" in determining when a

[2] Plaintiff's contention that the City's answer admits Perry used excessive force pursuant to municipal policy (Resp. Br. 42) takes the answer out of context. The City's answer was drafted prior to trial on the premise that Perry acted in self defense. Plaintiff concedes "the jury could have found that Thurston was a dangerously violent man determined to kill police officers if necessary to make his escape" (Resp. Br. 46). The subsequent jury finding of excessive force does not change the context in which the City's answer was drafted or justify plaintiff's contention.

[3] Reviewing the evidence in a light most favorable to the plaintiff, the lower court, despite characterizing Thurston's conduct as "reprehensible", stated the jury could have considered Thurston a nondangerous fleeing felon. *Kibbe*, 777 F.2d 807 (1985).

[4] Contrary to the plaintiff's argument, the City does not now and never has requested this Court to create a rule that training can never be relevant to municipal liability under § 1983 (Resp. Br. 14).

municipality should be held liable under § 1983. *Monell*, 423 U.S. at 713. An explicit requirement of an unconstitutional policy resolves these line drawing problems and maintains *Monell's* fault based standard. It also provides guidance for litigants and lower courts in determining proximate cause. The absence of any unconstitutional policy in this case requires reversal of the lower court's imposition of *Monell* liability.

B. *Deliberate Conduct or Conscious Choice Maintains the Fault Based Standard Required By* Monell.

Plaintiff contends "no requirement beyond simple negligence [should] be imposed as a matter of constitutional law in all *Monell* training cases" (Resp. Br. 25). Negligence is insufficient to establish municipal policy because it lacks the cognitive element of policy decisions necessary to distinguish the act of a municipality from the act of an employee. In *Monell*, the policy to force a leave of absence was consciously adopted. *Monell, supra* at 617 n.2. In *Pembaur*, the sheriff deliberately decided that the warrant should be served even if it meant breaking down the door. *Pembaur, supra* at 463. In *Kibbe*, there is no evidence that policymakers consciously or deliberately chose either inadequate training or the use of deadly force as the means of concluding motor vehicle pursuits.

Once a municipal policy is established, § 1983 liability attaches only if the policy meets the appropriate standard of culpability for the constitutional right violated.[5] For example, in *Monell*, the policy was intended to cause pregnant women

[5] The right at issue in this case is the Fourteenth Amendment Due Process Clause. A due process violation requires deliberate conduct. *Rochin* v. *California*, 342 U.S. 165, 172 (1952). Plaintiff's allegation that a Fourth Amendment right, as well as a Fourteenth Amendment right, is at issue, does not change the result (Resp. Br. 23 n.13). An inadvertent result does not violate either the Fourth Amendment or Fourteenth Amendment. See *Texas* v. *Brown*, 460 U.S. 730 (1983) (inadvertent discovery of contraband in plain view does not violate Fourth Amendment principles), *Williams* v. *Daniels*, 54 U.S.L.W. 4090 (1986). (Due Process not implicated by act causing unintended injury.) This Court recently equated the protections afforded under the Eighth Amendment in the context of prison safety with the protections afforded by substantive due process under the Fourteenth Amendment in *Whitley* v. *Albers*, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986) (use of deadly force to restore order in a prison riot). In the context of a claim of excessive force, this Court should hold that the Fourth Amendment affords no greater protection than the Fourteenth Amendment.

to take maternity leave at a specified time whether or not it was medically necessary. In *Pembaur*, policymakers consciously and deliberately intended to cause the capias to be served even if that meant breaking down the door. If the policy does not intend to cause the conduct, liability should not attach. Unlike *Monell* and *Pembaur*, in *Kibbe* no policy or policymaker intended to cause Perry to use deadly force against Thurston.[6]

"[L]ack of care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent." *Davidson* v. *Cannon*, 54 U.S.L.W. 4095, 4096 (1986). As in *Daniels* and *Davidson*, the inadequacies alleged here are "[f]ar from abusing government power, or employing it as an instrument of oppression." *Id*. A standard of deliberate conduct or conscious choice rather than gross negligence, preserves the distinction between constitutional violation and ordinary tort.

Amicus U.S. Conference of Mayors et. al., suggests a similar standard: that deliberate or conscious decision of a policymaker may be sufficient to impose § 1983 municipal liability if that decision is so grossly negligent as to amount to deliberate indifference (*Amicus* U.S. Conference of Mayors et. al., Br. 7). The City and *Amicus* unite in suggesting that policy is created by conscious choice or deliberate conduct. Once policy

[6] See *Amicus* U.S. Conference of Mayors et. al., p. 10-11 and n.9, for discussion of Captain Spellacy's role in the pursuit.

is established the standards suggested for liability are similar but vary in their terminology. If this Court adopts the standard suggested by *Amicus* reversal is required. The First Circuit panel in *Kibbe* approved *Monell* liability for gross negligence[7] without requiring deliberate indifference or any other cognitive element. *Id.* at 804. Cf. *Voutour* v. *Vitale*, 761 F.2d 812 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 879 (1986) (liability based on gross negligence amounting to deliberate indifference).

The Due Process Clause imposes limitation on government power rather than affirmative funding obligations. *Harris* v. *McRae*, 448 U.S. 297, 318 (1980). In the context of police activities this Court has rejected liability based on a "failure to act" and has refused to lend credence to a constitutional "duty" to "eliminate" police misconduct by taking "whatever preventative measures are necessary, within its discretion, to secure the 'right' at issue." *Rizzo* v. *Goode*, 423 U.S. 362, 376 (1976). *Rizzo* stated that such reasoning "blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983." *Id.* The Court further stated that it has "never subscribed to these amorphous propositions". *Id.*

II. A *Monell* Claim Should Not be Based on Common Law Agency Principles.

Plaintiff urges the Court to invoke "agency" principles as a substitute for the policy based liability required by Congress as interpreted in *Monell*[8] (Resp. Br. 9-10). Agency principles

[7] The City maintains that the evidence was insufficient to even satisfy the lower gross negligence standard (Pet. Br. 26-32).

[8] Plaintiff's cite to *Meritor Savings Bank* v. *Vinson*, 54 U.S.L.W. 4703, 106 S.Ct. 2399 (1986) is not persuasive. In *Meritor* the Court found Congress

from 1871 have no application in this case because police officers are not agents or servants of municipalities.[9]

Plaintiff erroneously contends that the law applicable to municipalities in 1871 permitted imposition of liability on the City (Resp. Br. 17). Even if police officers are incorrectly considered municipal agents, in 1871 a municipality was not liable for the acts of its agents unless the agents were involved in a proprietary function. "Ninteenth-century courts generally held that municipal corporations were not liable for acts undertaken in their 'governmental', as opposed to their 'proprietary', capacity." *Owen* v. *City of Independence*, 445 U.S. 622, 676-679 (1980). See *Bigelow* v. *Inhabitants of Randolph*, 80 Mass. (14 Gray) 541, 544-545 (1860) distinguishing *Thayer* v. *Boston*, 36 Mass. (19 Pick.) 511 (1836). Law enforcement by police is a governmental function. *Buttrick*, *supra* at 173. Training is a governmental function. *Oeschger* v. *Fitzgerald*, 2 Mass. App. Ct. 472, 474 (1974) (no liability under *respondeat superior* for training nonfeasance).[10]

Plaintiff's statement of the law of agency as applied to police officers is inaccurate and without foundation. It is no more

intended to use agency principles for guidance based on Congress's decision to define "employer" to include any "agent" of an employer in 42 U.S.C. § 2000e(b).

[9] Under state law police officers act in their public capacity and not as agents or servants of municipalities. *Buttrick* v. *City of Lowell*, 83 Mass. (1 Allen) 172 (1861). *Kimball* v. *City of Boston*, 83 Mass. (1 Allen) 417 (1861). *Molinari* v. *City of Boston*, 333 Mass. 394, 396 (1955). See also *Pembaur*, *supra* at 4293 (state law determines authority of official).

[10] See *Jackson* v. *Byrne*, 738 F.2d 1443 (7th Cir. 1984) (No constitutional duty under the Fourteenth Amendment to protect from fire absent special relationship). Compare the public duty doctrine discussed in *Irwin* v. *Ware*, 392 Mass. 745, 467 N.E.2d 292 (1984) (A special relationship exists where there is a risk of immediate and foreseeable physical injury to persons who could not reasonably protect themselves from it) with *Nickerson* v. *Commonwealth*, 397 Mass. 476, 492 N.E.2d 90 (1986) (Plaintiff must show that a special duty of care was owed to him beyond the duty owed to the general public). In the context of a *Monell* claim a special relation between a policy or policymaker and the plaintiff should be required.

than a veiled attempt to eviscerate *Monell's* prohibition of vicarious liability through the guise of agency principles.

III. The Inferences on Which The First Circuit Allowed Liability Are Improper.

Plaintiff's suggestion that the First Circuit properly imposed liability by inferring a failure to train police officers in alternative techniques of stopping vehicles which refuse to stop is wrong (Resp. Br. 38). There is no evidence of such a "policy" and no evidence of a causal connection.[11]

The analysis used by the First Circuit to infer a failure to train refers to the City's police regulation on firearms prohibiting use of deadly force prior to exhausting all reasonable alternatives (Rule 28, App. 107-108). The First Circuit stated this regulation showed that policymakers knew of the need for alternatives to the use of deadly force. *Kibbe, supra* at 808. The First Circuit then discussed evidence of training, citing the testimony to two nonpolicymakers.[12] Based on this testimony the First Circuit created the inference that policymakers decided not to train in alternative manners of stopping vehicles without using deadly force. *Kibbe, supra* at 808. The First Circuit suggested, *inter alia*, crowding and surrounding

[11] "[W]here the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation." *Tuttle*, 105 S.Ct. at 2436.

[12] Officer Schaub testified that he was told not to set up physical roadblocks but that he should use his lights and siren, stand in the streets and put up his hand in a stopping motion. Officer Troy testified that his training on stopping a car consisted of being told to move up behind it put on his lights and siren, and hope the suspect pulls over. This testimony was not exhaustive of the City's police training. See e.g., App. 207, 211-212, 217-218, 219-220.

were appropriate alternatives. The tactics were not alternatives to deadly force. See I.A.C.P. model rules limitng offensive driving tactics to situations where deadly force is permitted (Pet. Br. 27 n.16). *Kibbe, supra* at 807. There was no evidence from which the jury could infer that these tactics were an appropriate police response in the circumstances of this pursuit. These tactics are certainly not appropriate for a motorcycle officer, particularly one ordered out of the pursuit. "A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States* v. *Sharpe*, 105 S.Ct. 1568, 1576 (1985).

There is no evidence that policymakers authorized the use of deadly force in the circumstances of this pursuit or that policymakers had any knowledge that Perry would shoot Thurston. The City has an express rule prohibiting use of deadly force against nondangerous fleeing felons and trains its' officers in that rule. Without knowledge that the rule or training is inadequate, it is impossible to infer a conscious policy decision not to train in alternatives to the use of deadly force for stopping vehicles which refused to stop. There was no prior pattern of misconduct from which City policymakers or the jury could infer knowledge that either the rule or the training was inadequate.

If "arguable violations" of officers other than Perry are considered a "pattern", they provide no basis for imputing knowledge of training inadequacies to policymakers. Such acts were contemporaneous with Perry's act. Policymakers had no opportunity to prevent Perry's action. The defect here is similar to the defect in *Tuttle* at it allows a "§ 1983 plaintiff to establish liability without proof of a single decision by a policymaker." *Tuttle, supra* at 2435.

The inference that training was the "moving force" of the alleged deprivation is also erroneous. *Kibbe, supra* at 809.

There is no evidence of an "affirmative link" between any training policy and Perry shooting Thurston. There was no evidence that Perry's training deviated from recognized standards. The record does not disclose what training Perry was given with regard to stopping vehicles which refuse to stop or what training should have been given. Without such evidence there is no link between Perry's training and Perry shooting Thurston. This Court should require proof that a specific deficiency in training is linked to the alleged deprivation before allowing an inference of causation. *Vippolis* v. *Village of Haverstraw*, 768 F.2d 40 (2d Cir. 1985); *Slaven* v. *City of Salem*, 386 Mass. 885, 438 N.E.2d 348 (1982) (Absent proof of recognized standards, municipality not liable where it neither knows nor has reason to know of unreasonable risk of suicide by prisoner). An inference of "causation" in the absence of proof of specific deficiency and affirmative link to training results in a jury assessing liability on the basis of mere speculation.

Conclusion.

For the foregoing reasons, and for the reasons stated by *Amicus*, U.S. Conference of Mayors, et al., petitioner urges reversal of the decision of the Court of Appeals.

Respectfully submitted,

EDWARD M. PIKULA,
Assistant City Solicitor,
Counsel of Record,
RICHARD T. EGAN,
City Solicitor,
HARRY P. CARROLL,
Deputy City Solicitor,
SUSAN J. McFARLIN,
Staff Attorney,
Law Department,
City of Springfield,
36 Court Street,
Springfield, Massachusetts 01103.
(413) 787-6085

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAY 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF SPRINGFIELD, MASSACHUSETTS,
Petitioner,

v.

LOIS THURSTON KIBBE, ADMINISTRATRIX
OF THE ESTATE OF CLINTON THURSTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID O. STEWART
MICHAEL J. GERHARDT
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

2718

QUESTIONS PRESENTED

I. Whether inadequate training of police officers can give rise to municipal liability under 42 U.S.C. § 1983 in the absence of a showing:

(a) that the inadequate training resulted from the deliberate decision of a municipal policymaker; or

(b) that policymakers were chargeable with knowledge of the inadequacy of the training because it was reflected in widespread practices.

II. Whether inadequacies in the training of police officers can give rise to municipal liability under 42 U.S.C. § 1983 in the absence of a showing that the training was so grossly negligent as to amount to deliberate indifference.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. MUNICIPAL LIABILITY UNDER SECTION 1983 BASED ON A POLICY OF INADEQUATE POLICE TRAINING REQUIRES A SHOWING THAT THE POLICY WAS ADOPTED BY MUNICIPAL POLICYMAKERS	7
A. A Municipal Policy Of Inadequate Training May Be Shown By Direct Evidence Of A Decision By A Responsible Municipal Official Or By Evidence Of Widespread Police Practice Consistent With The Alleged Policy	7
B. A Single Act By A Nonpolicymaking Officer Is Not Sufficient To Prove A Municipal Policy Of Inadequate Police Training	12
II. EVEN IF A MUNICIPAL POLICY IS PROVED, MUNICIPAL LIABILITY UNDER SECTION 1983 FOR INADEQUATE POLICE TRAINING REQUIRES A SHOWING THAT THE POLICY IS SO GROSSLY NEGLIGENT AS TO AMOUNT TO DELIBERATE INDIFFERENCE	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

City of Los Angeles v. Heller, No. 85-531 (U.S. April 21, 1986) 6, 14
City of Oklahoma City v. Tuttle, 105 S.Ct. 2427 (1985) ..... *passim*
Daniels v. Williams, 106 S.Ct. 662 (1986) 16
Davidson v. Cannon, 106 S.Ct. 668 (1986) 16
Fiacco v. City of Rensselaer, N.Y., 783 F.2d 319 (2d Cir. 1986) 16
Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984) 13
Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985) 17
Hays v. Jefferson County, 668 F.2d 869 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982) 18
Heidbreder v. Northampton Township Trustees, 64 Ohio App.2d 95, 411 N.E.2d 825 (Ct. App. 1979) 19
Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981) 18
Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, 106 S.Ct. 1374 (1986) ..... *passim*
Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984) 17, 19
Leite v. City of Providence, 463 F. Supp. 585 (D.R.I. 1978) 18
Marchese v. Lucas, 758 F.2d 181 (6th Cir. 1985), *petition for cert. pending sub nom. County of Wayne v. Marchese*, No. 85-359 17
McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979) 13
Monell v. Department of Social Services, 436 U.S. 658 (1978) 8, 9, 10, 14, 15
Myers v. Town of Harrison, 438 F.2d 293 (2d Cir.), *cert. denied*, 404 U.S. 828 (1971) 19
Owens v. Haas, 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979) 13, 17
Pembaur v. City of Cincinnati, 106 S.Ct. 1292 (1986) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Selkowitz v. County of Nassau, 45 N.Y. 2d 97, 379 N.E. 2d 1140 (1978) 19
Vippolis v. Village of Haverstraw, 768 F.2d 40 (2d Cir. 1985) 15
Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 979 (1986) 17
Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983) 18, 19

STATUTES

42 U.S.C. § 1983 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1217

CITY OF SPRINGFIELD, MASSACHUSETTS,
Petitioner,

v.

LOIS THURSTON KIBBE, ADMINISTRATRIX
OF THE ESTATE OF CLINTON THURSTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* and their members

have a compelling interest in legal issues that affect state and local governments.

This case concerns the circumstances under which a municipality may be held liable under 42 U.S.C. § 1983 for unconstitutional conduct allegedly attributable to inadequate police training, not itself an unconstitutional policy, as well as the proper application of this Court's decisions in *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292 (1986), and *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427 (1985). The Court of Appeals for the First Circuit affirmed a judgment against the City of Springfield, Massachusetts, for $50,000 compensatory damages in a suit under Section 1983. The facts centered on a fatal shooting by police during a high-speed chase of respondent's decedent, who had abducted a woman and had reacted with violence to the attempt to apprehend him. *Amici* believe that the court of appeals' holding that municipalities may be liable under Section 1983 for an inferred "policy" of inadequate training based on a single shooting incident unduly limits the holdings in both *Pembaur* and *Tuttle*.

The ruling below unfairly adds to the already considerable burden on municipalities of potential judgments under Section 1983. The court of appeals totally failed to require proof of a municipal policy, which this Court has repeatedly stressed is the touchstone for municipal liability under Section 1983. In particular, the court's description of the underlying incident as a series of events reduces *Tuttle*'s "single incident" rule to an empty verbal formulation; but that rule is of particular importance to police officers working together in hot pursuit of a violent, fleeing felon. In addition, the court applied an incorrect standard for imposition of municipal liability, which will lead to unsubstantiated and improper verdicts against municipalities.

Amici submit that the decision below is erroneous. Because this Court's decision will have a direct effect on

matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

This case squarely raises the question reserved in *City of Oklahoma City v. Tuttle*, 105 S.Ct. at 2436 n.7: whether a municipality may be held liable under 42 U.S.C. § 1983[2] for the shooting death of an individual, on the theory that the death was the result of inadequate police training that is not itself an unconstitutional practice or policy. The case arose out of the hot pursuit of a fleeing felon on the evening of September 29, 1981. On that evening, the Springfield Police Department received a series of emergency calls from a residence; when the police arrived, they learned that Clinton Thurston had abducted Pamela Etter from her home and had fled with her in his automobile.

Police Officer Erich Risch spotted the vehicle and gave chase in his unmarked car, activating his flashing headlights, portable blue light, and siren. When Thurston stopped at an intersection, Officer Risch approached and identified himself as a police officer. In response, Thurston sped through the red light. Officer Risch and other police cruisers took up the chase. Two other officers attempted to

---

[1] Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

[2] 42 U.S.C. § 1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

set up a road block at an intercept point. When Thurston approached, he accelerated toward them, narrowly missing Officer John Troy. Troy fired at Thurston's rear tire, hitting the rim of the wheel.

At the next intersection, Officers Kenneth Schaub and Theodore Perry tried to intercept Thurston. Thurston instead swerved toward Officer Schaub, who dived out of the way and fired at the vehicle. Officer Perry (who had not heard radio instructions from the supervisor on duty, Captain Spellacy, that motorcycles should stay out of the pursuit) joined the chase on his motorcycle. He pulled alongside of Thurston's vehicle and ordered him to pull over. Instead, Thurston attempted to drive Officer Perry off the road by swerving into Perry's lane. After Thurston's second and third attempts, Officer Perry fired at him, and his second shot hit Thurston in the back of the head. Thurston subsequently died in a local hospital, about three hours after the initial call to the police.

Respondent, the administratrix of Clinton Thurston's estate, filed suit against ten police officers and the City of Springfield, alleging negligent or intentional deprivation of civil rights by the police officers and negligent training or supervision by the City. The claims against all defendants except the City of Springfield and Officers Perry, Schaub, Troy, and Risch were later voluntarily dismissed. The district court denied the City's motion for a directed verdict. The jury subsequently awarded respondent a verdict against Officer Perry, for $1.00 compensatory damages and $500 punitive damages; and against the City for $50,000 compensatory damages. By special verdicts, the jury found that the other officers had not violated the decedent's civil rights. The district court denied the City's motion for judgment notwithstanding the verdict.

The Court of Appeals for the First Circuit affirmed the district court's denial of the City's motions. *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, 106 S.Ct. 1374 (1986). The court of appeals acknowledged the doubt expressed by the *Tuttle* plurality about whether "a harm allegedly caused by a policy of gross negligence in police training could meet § 1983's standard of causation" (Pet. App. 6a, 777 F.2d at 804). Nevertheless, the court held this to be a viable theory, and found the city liable in this "admittedly close case" (*ibid*). In so holding, the court cited factors that could have led the jury to *infer* a municipal policy of grossly negligent training, and, in turn, to *infer* that Thurston's death resulted from that negligence.[3]

SUMMARY OF ARGUMENT

A City can be held liable under 42 U.S.C. § 1983 for providing inadequate police training if a deprivation of constitutional rights results from a municipal policy of inadequate training. The key issue is what standards govern the imposition of such liability, particularly because the inadequate police training is not itself an unconstitutional policy or practice.

Pembaur and *Tuttle* both condition municipal liability under Section 1983 on proof that responsible policymakers *deliberately* adopted or authorized a "policy" with respect to the subject matter in question. Therefore, municipal liability requires a showing of either a deliberate decision

---

[3] The court of appeals stated (Pet. App. 6a, 777 F.2d at 804) that:

> the evidence consisted principally of: (1) testimony that there was but little guidance for undertaking an automobile chase; (2) testimony, contrary to that of the officers, that Thurston was not posing a life-threatening hazard to them; (3) a department rule on the use of firearms which in part required preliminary resort to less severe alternatives, arguably ignored by the officers; (4) another part of the rule which proscribed firing where there was substantial danger to innocent people, arguably violated by two officers; (5) a dispatcher's arguably overzealous announcement on police radio; and (6) evidence of looseness in investigating shootings.

of a policymaker or acquiescence in widespread or notorious conduct reflecting such a policy.

Under *Tuttle*, a single police shooting incident is insufficient to impose liability on a City on a theory of inadequate training. The court of appeals skirted this plain holding by treating the episodes within the high-speed chase of Thurston as separate "incidents." To divide this scenario into its component frames is totally unrealistic in terms of the exigencies of police cooperation in the hot pursuit of a criminal. Moreover, the court's approach does not advance the appropriate inquiry, because only Perry was found liable for an unconstitutional act; accordingly, under this Court's decision in *City of Los Angeles v. Heller*, No. 85-531 (U.S. April 21, 1986), it is only his conduct that could be used to show fault on the part of the City.

Even where a policy is shown, liability is dependent upon proof of culpable conduct. This Court has held that mere negligence is insufficient to establish a violation of due process rights. *Amici* submit that municipal liability for constitutional harm resulting from a policy of inadequate police training requires a showing of gross negligence amounting to deliberate indifference on the part of responsible city officials in adopting or maintaining that policy. This standard, which is supported by a number of lower court decisions, will allow municipalities the necessary flexibility to diversify training according to the needs of each community, and will screen out unfounded and unsubstantiated allegations of inadequate police training made solely on the basis of a single shooting of a suspected criminal by a police officer.

Applying these standards for municipal liability to this case, it is clear that the court of appeals erred in affirming the district court's denial of the City's motions for directed verdict and for judgment notwithstanding the verdict. On any view of the facts, respondent proved neither a municipal "policy" of inadequate police training, nor that the training policy was so grossly negligent as to amount to deliberate indifference.

ARGUMENT

At the heart of this case is the need to identify the proper standard of care under which a municipality may be held liable for inadequate police training. Logically, however, any analysis of municipal liability under Section 1983 must begin with the determination that the conduct causing the deprivation of constitutional rights was pursuant to municipal policy. Thus, a municipality should be held liable under Section 1983 for "inadequate police training" *only* when the plaintiff establishes (1) that the municipality has a policy of inadequate training, either by proof of a deliberate decision by a responsible policymaker or by proof of acquiescence in widespread or notorious police practices; (2) that the alleged inadequacy reveals gross negligence that amounts to deliberate indifference; and (3) that the grossly negligent police training practices caused a deprivation of constitutional rights. These requirements are well supported by decisions of this Court and lower courts, and by sound policy considerations.

I. MUNICIPAL LIABILITY UNDER SECTION 1983 BASED ON A POLICY OF INADEQUATE POLICE TRAINING REQUIRES A SHOWING THAT THE POLICY WAS ADOPTED BY MUNICIPAL POLICYMAKERS

A. A Municipal Policy Of Inadequate Training May Be Shown By Direct Evidence Of A Decision By A Responsible Municipal Official Or By Evidence Of Widespread Police Practice Consistent With The Alleged Policy

Pembaur v. City of Cincinnati, *supra*, and *City of Oklahoma City v. Tuttle*, *supra*, clearly establish that liability cannot be imposed in this case without a de-

liberate decision by a responsible policymaker in the City of Springfield to train its police officers inadequately. *Pembaur* and *Tuttle* draw on and amplify the holding of *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), that municipal liability under Section 1983 is limited to deprivations of federally protected rights caused by action taken "pursuant to official municipal policy of some nature." In language equally applicable to the instant case, the Court cautioned "that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy . . ., whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

Pembaur requires that liability under Section 1983 be based on a deliberate decision *by a municipal policymaker*. *Pembaur* held that "municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives *by the official or officials responsible for establishing final policy with respect to the subject matter in question.*" 106 S.Ct. at 1300 (emphasis added).[4]

The *Pembaur* Court also explained that its decision was "entirely consistent" with *Tuttle*, in which "both the plurality and concurring opinions found plaintiff's submission inadequate because she failed to establish that the unconstitutional act was taken *pursuant* to a municipal policy rather than simply resulting from such a policy in a 'but for' sense." *Id.* at 1300 n.11 (emphasis in

[4] The district court instructed the jury that the City of Springfield could be held liable if it had a custom or practice of grossly negligent failure to train. Respondent, however, had the burden of establishing that the City's policy of inadequate training resulted from a deliberate decision by a responsible policymaker, and did not introduce any evidence to satisfy that burden.

original). In *Tuttle*, both the plurality and the concurring opinions emphasized that in order for a municipality to be liable under Section 1983 for a "policy," there must be proof of a deliberate choice or decision by policymakers to implement the particular policy being challenged.[5] *See also Monell, supra* (holding municipality liable for its conscious choice of a policy of compelling maternity leave before it was medically required). Thus, the City of Springfield may not be held liable under Section 1983 for inadequate police training, not unconstitutional in and of itself, unless there is proof of a deliberate decision by a responsible policymaker to adopt or maintain a "policy" of inadequate training.[6]

[5] For example, the *Tuttle* plurality declared that

> it is therefore difficult in one sense even to accept the submission that someone pursues a "policy" of "inadequate training," unless evidence be adduced which proves that the inadequacies resulted from conscious choice—that is, proof that the policymakers deliberately chose a training program which would prove inadequate. And in the second place, some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official . . . . *Monell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy." At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged.

105 S.Ct. at 2436. *See also id.* at 2439, 2440 (Brennan, J., concurring).

[6] The *Tuttle* plurality noted the additional problems of proof of municipal liability on the basis of a policy that is not itself unconstitutional. The problem centers on whether such a policy can give rise to municipal liability without proof that the policy directly caused a deprivation of constitutional rights. Thus, the plurality in *Tuttle* expressed doubt about whether inadequate training of police

In this case, however, the respondent utterly failed to prove any deliberate decisions made or actions taken by "proper municipal policymakers." *Pembaur*, 106 S.Ct. at 1300 n.11.[7] Under *Pembaur*, certainly Officer Perry, a line officer in the field, was not a "policymaker." The only conceivably relevant decision by a "policymaker," in the *Pembaur* sense, was made by Captain Spellacy, who ordered that the chase should be continued and that motorcycles should not participate in it. Captain Spellacy's order, of course, proves nothing about the adequacy of the municipality's police training, for he was not the official responsible for training. Moreover, Captain Spellacy's instruction that motorcycles should stay out of the chase was not followed; Perry, of course, did not stay out of the chase.[8] Where a police officer ignores a rule

---

officers can ever meet the "policy" requirement for liability set forth in *Monell, supra*, stating:

> [I]t is open to question whether a policymaker's "gross negligence" in establishing police training practices could establish a "policy" that constitutes a "moving force" behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policymaker would be required.

105 S.Ct. at 2436 n.7.

[7] The court of appeals disposed of this evidentiary requirement by its statement that "[t]he City . . . does not challenge the jury's implicit finding that decisions regarding the type of training received by Springfield's police officers are a matter of policy attributable to the City . . . ." Pet. App. 13a n.5, 777 F.2d at 807 n.5. However, the fact that the "type of training" administered was a matter of municipal policy does not establish that municipal policymakers approved the alleged inadequacy to which the court attributed Thurston's death. The court's characterization of "decisions regarding the type of training" as "a matter of policy" results simply in the imposition of liability as a matter of *respondeat superior*, a doctrine which this Court has steadfastly refused to apply to municipalities under Section 1983. *See Pembaur*, 106 S.Ct. at 1302-04 (Stevens, J., concurring in part and concurring in the judgment).

[8] The same flaw exists in other factors cited by the court of appeals as evidence of the gross negligence in this case (see note 3, *supra*), for example, that the officers arguably ignored a department rule on the use of firearms.

or policy that responsible policymakers have put in place, his conduct, without more, shows nothing about the inadequacy of the municipality's policies or the gross negligence of policymakers.[9] Thus, under *Pembaur* and *Tuttle*, the court of appeals plainly erred because it failed to require that the plaintiff establish that any events leading to Thurston's death were "pursuant" to a "policy" of inadequate training of the City of Springfield. *See Pembaur*, 106 S.Ct. at 1300 n.11 The Court imposed liability upon a showing, at most, of gross negligence by the individual officers.

Surely, a finding of municipal liability should not be predicated, as here, on "sparse" evidence of the City's training policy or largely on evidence of the shooting incident itself. Pet. App. 6a, 777 F.2d at 804; Pet. App. 13a, 777 F.2d at 807. To show a "policy" of inadequate training, a claimant must prove a deliberate act or omission on the part of responsible officials (*see Pembaur*, 106 S.Ct. at 1299-1300; *Tuttle*, 105 S.Ct. at 2436 n.7), such as purposefully allocating insufficient time or funds for training or knowingly employing incompetent instructors. Any lesser standard of proof will permit a Section 1983 lawsuit against a local government to go to the jury in any case in which a police officer discharges a firearm under merely questionable circumstances—such as those of this case, where police officers were in hot pursuit of a violent, fleeing felon and therefore forced to make instantaneous, instinctive judgments.

---

[9] In any event, Captain Spellacy's decision to continue the pursuit was not shown to be negligent, let alone grossly negligent; nor did this decision reflect any City policy to train its police officers in a manner at least so grossly negligent as to amount to deliberate indifference. *See* Part II, *infra*.

B. A Single Act By A Nonpolicymaking Officer Is Not Sufficient To Prove A Municipal Policy Of Inadequate Police Training

In *Tuttle*, the Court held that the jury could not be allowed to infer municipal liability from a single act by a police officer. In *Pembaur*, a municipality was held liable under Section 1983 based on a single decision made on a single occasion. *Pembaur*, however, involved a single *decision* by a *policymaker*, whereas this case, like *Tuttle*, involves merely a single *act* by a *nonpolicymaker*, a police officer. When *Pembaur* and *Tuttle* are read together, two propositions concerning municipal liability because of inadequate police training become clear. First, municipal liability may not be based on a single act by a nonpolicymaker, such as a police officer; a single action may be the basis for liability only if taken by a policymaker. Second, a municipal "policy" may not be inferred from a single incident of harm by a police officer. Even if a number of similar incidents may give rise to such an inference, it is not proper in this case in which only a single incident was proved.[10] By holding that the hot pursuit by police which culminated in a fatal shooting by one police officer amounted to more than a "single incident," the court of appeals read *Tuttle* far too narrowly.

The court of appeals distinguished *Tuttle* on the basis of this unsupported assertion: "[i]t can not be that an incident that is single only in that it begins and ends within a confined period of time can never give rise to a finding of municipal liability." Pet. App. 11a n.4, 777 F.2d at 806 n.4. But surely a hot pursuit of a single

[10] A municipal policy may be inferred from widespread or notorious practices if it is also shown that a responsible policymaker knew or should have known of the practice. The officers' testimony in this case could not prove a widespread or notorious practice because they all participated in a single incident.

criminal by several police officers culminating in a shooting is "single" in any meaningful sense of the word.

The constitutional injury alleged in this case stemmed from Officer Perry's conduct during the chase. Rather than a series of discrete, separable events, the chase was a single incident evidencing no "pattern" or "policy" of inadequate training. Hot pursuit necessarily includes geographical transitions and may last for more than a brief moment; but it cannot meaningfully be broken down into more than one incident without creating arbitrary distinctions and subjecting on-the-spot law enforcement actions to entirely unrealistic hindsight review. *Tuttle* is sapped of all vitality if lower courts can avoid its rule by interpreting one episode as multiple incidents simply because it lasts for more than a moment and involves several officers. Other courts have held that participation by several police officers in wrongful activity does not in and of itself create more than one incident. *See, e.g., Gilmere v. City of Atlanta*, 737 F.2d 894 (11th Cir. 1984), and *McClelland v. Facteau*, 610 F.2d 693, 695 (10th Cir. 1979). *Cf. Owens v. Haas*, 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

Moreover, in this case, only a *single* officer was found liable; the other three officers whose conduct the jury considered were acquitted of unconstitutional behavior. Where, as here, a jury finds only one officer liable for a particular deprivation of rights, only a single incident of violative behavior is shown. If the behavior of the other officers was constitutionally appropriate, it is not evidence of other incidents in which constitutional rights were denied.[11]

[11] It is theoretically possible that the conduct of the other officers, even though they caused no harm to Thurston, could be viewed as evidence of the inadequacy of the City's police training. Even if

This Court's recent decision in *City of Los Angeles v. Heller*, No. 85-531 (U.S. April 21, 1986) (*per curiam*), supports this conclusion. In *Heller*, this Court held that Section 1983 principles do not "authoriz[e] the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm." *Id.*, slip op. at 3. It follows that when a jury has found that certain officers' actions did not "inflic[t] . . . constitutional harm," as in this case, then their actions cannot give rise to municipal liability. Consequently, in this case, the municipality's liability for inadequate training can be imposed, if at all, only on the basis of Officer Perry's conduct.

To allow an inference of a "policy" from such a single incident would undermine *Monell*'s prohibition against municipal liability based solely on the theory of *respondeat superior*. It was on this basis that both the plurality and the concurring opinions in *Tuttle* endorsed the requirement of direct evidence of municipal "policy" rather than permitting a "policy" to be inferred from a single incident. "To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* liability rejected in *Monell*." *Tuttle*, 105 S.Ct. at 2440 (Brennan, J., concurring).[12]

---

the training were inadequate, however, respondent must still prove that the inadequate training resulted from a policy of the City, either by direct proof of that policy (*see* Part I.A., *supra*), or by inference from other incidents of constitutional harm. Whether the City failed to provide ideal training, or was negligent in the training of a particular officer, is not the test for municipal liability under Section 1983.

[12] The *Tuttle* plurality further ruled that in a Section 1983 case based on allegations of inadequate training, "considerably more proof than the single incident will be necessary . . . to establish both

In this case, the court of appeals, without direct testimony, and without proof of incidents other than the one giving rise to the fatal shooting, upheld the City's liability. The court held that the jury could infer from the shooting and other police conduct during the pursuit that the City's police training was inadequate, that the inadequacy represented a municipal "policy," and that that policy was responsible for the shooting. This tortuous reasoning results, in effect, in imposition of liability on the City based on a theory of *respondeat superior*, in direct contravention of *Monell* and *Tuttle*.

II. EVEN IF A MUNICIPAL POLICY IS PROVED, MUNICIPAL LIABILITY UNDER SECTION 1983 FOR INADEQUATE POLICE TRAINING REQUIRES A SHOWING THAT THE POLICY IS SO GROSSLY NEGLIGENT AS TO AMOUNT TO DELIBERATE INDIFFERENCE

Proof of a municipal policy alone is not sufficient as a basis for municipal liability. A plaintiff in a Section 1983 case must also establish that municipal officials violated the appropriate standard of care, causing the particular constitutional harm in question.

Recent decisions of this Court establish that Section 1983 does not afford a remedy for violations of due

---

the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." 105 S.Ct. at 2436 (footnotes omitted). Respondent, who proved only a single incident of police misconduct, not only failed to establish "the requisite fault on the part of the municipality" but also failed to establish the requisite *causal* connection between the municipality's alleged "policy" to train inadequately and the deprivation of the decedent's constitutional rights. In this case, respondent failed to "make some showing that specific deficiencies in the training given police officers led the misbehaving officer [Officer Perry] to engage in the alleged misconduct." *Vippolis v. Village of Haverstraw*, 768 F.2d 40, 44-45 (2d Cir. 1985). Thus, the court of appeals erred in not requiring respondent to introduce at least some evidence—for example, evidence of other similar incidents—tending to show a link between the alleged policy of inadequate training and the infliction of constitutional injury.

process on the basis of negligence alone. *See Daniels v. Williams*, 106 S.Ct. 662, 664 (1986), and *Davidson v. Cannon*, 106 S.Ct. 668, 670-71 (1986).[13] Thus, inadequacies in police training that reflect mere negligence on the part of responsible municipal officials who adopted or maintained the training program do *not* constitute violations of due process giving rise to municipal liability under Section 1983.[14]

A number of lower courts—including the First, Second, Fourth, and Fifth Circuits—have held that municipalities may be held liable for inadequate police training, but only when the claimant proves that the inadequacies reveal gross negligence amounting to deliberate indifference. *See, e.g., Fiacco v. City of Rensselaer, N.Y.*, 783 F.2d 319, 326 (2d Cir. 1986) (holding that the City may be held liable under Section 1983 for nonsupervision of police

[13] *Daniels* and *Davidson* involved allegedly negligent denials of due process because of deprivations of liberty. Whatever limits there may be on their applicability to other constitutional violations, their reasoning is clearly applicable to denials of due process in other factual contexts, such as the loss of life in this case. *See Daniels*, 106 S.Ct. at 663; *Davidson*, 106 S.Ct. at 670.

[14] It is difficult to determine in this case just what standard the lower courts applied. The district court instructed the jury that the City of Springfield could be held liable under Section 1983 only if its failure to train had been grossly negligent. As the court of appeals noted, however, the instructions did not emphasize "the distinction between negligence and reckless or grossly negligent conduct" (Pet. App. 20a, 777 F.2d at 810). And the district court based its denial of the City's motion for judgment notwithstanding the verdict partially on the ground that there was sufficient evidence upon which the jury could have inferred that the City had been "negligent" in implementing or fashioning a policy for the training of its police officers. In affirming the district court, the court of appeals determined that "gross negligence" was the proper basis for liability and that there was sufficient evidence upon which the jury could infer the City had been grossly negligent in implementing or fashioning a policy for police training. As we discuss below, even the "gross negligence" standard is insufficient; moreover, the evidence was insufficient to prove that responsible policymakers were grossly negligent.

officers "on the basis of a policy of deliberate indifference to the constitutional rights of persons within its domain."); *Voutour v. Vitale*, 761 F.2d 812, 820 (1st Cir. 1985) ("Like most other courts that have addressed the matter, we hold that the supervisor must demonstrate at least gross negligence amounting to deliberate indifference, and that this conduct must be causally linked to the subordinate's violation of plaintiff's civil rights."), *cert. denied*, 106 S.Ct. 979 (1986)[15]; *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983) ("failure to train must constitute gross negligence amounting to conscious indifference"), *cert. denied*, 467 U.S. 1215 (1984); *Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir.) ("the failure to train or supervise law enforcement officers must be so grossly negligent as to constitute 'deliberate indifference' in order to hold the county liable"), *cert. denied*, 444 U.S. 980 (1979). *Cf. Marchese v. Lucas*, 758 F.2d 181, 187-88 (6th Cir. 1985) (affirming finding of liability of county because of official toleration of, if not complicity in, assault on prisoner, as well as concealment of events and subsequent failure to investigate), *petition for cert. pending sub nom. County of Wayne v. Marchese*, No. 85-359; *Grandstaff v. City of Borger, Texas*, 767 F.2d 161, 169 (5th Cir. 1985) (recognizing that for a City to be liable under Section 1983 "[t]here must be (1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of a constitutional right"; and ultimately affirming City liability

[15] Without explanation, the panel below for the Court of Appeals for the First Circuit deviated from the preferable standard adopted by the First Circuit panel in *Voutour v. Vitale, supra*, which required not merely gross negligence but gross negligence amounting to deliberate indifference. The difference is not merely semantics. The inclusion in the standard of liability of a component of deliberate indifference is necessary as proof of the cognitive element of policy decisions. *Cf. Tuttle*, 105 S.Ct. at 2436 & n.7 (plurality opinion).

where City policymaker knew or should have known City's police officers were likely to shoot to kill without justification and without restraint); *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983) ("A number of courts have interpreted *Monell* to hold that a municipal policy of authorizing or condoning police misconduct can be inferred where the municipality has been grossly negligent in the supervision and training of its police force."); *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir.) (municipal liability arises only where the plaintiff has shown a complete failure to train or training is so reckless or grossly negligent that future police misconduct is almost inevitable), *cert. denied*, 459 U.S. 833 (1982); *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981) (municipality may be held liable under Section 1983 for its failure to train police officers or its grossly negligent training); *Leite v. City of Providence*, 463 F. Supp. 585, 591 (D.R.I. 1978) ("training must be nonexistent or reckless, or grossly, palpably, and culpably negligent").[16]

Adopting the standard of gross negligence amounting to deliberate indifference will preserve important policy concerns. Local governments should not be readily subjected to liability for imperfections in policy or for correct policies which are imperfectly executed. Individual municipalities must be allowed the flexibility to determine the specific training necessary for police officers who serve that community. Because of the risk that hindsight will result in second-guessing police officers who must act in exigent circumstances, municipal liability is properly imposed only when the policy regarding training is shown by specific proof to be so grossly negligent as to amount to deliberate indifference.

---

[16] The precise terminology used by these courts may seem facially inconsistent, but the standard applied in each case was essentially that of gross negligence amounting to deliberate indifference. *See* note 15, *supra*.

This case reflects just such a risk. The "sparse," indirect evidence approved by the court of appeals (Pet. App. 13a, 777 F.2d at 807) was insufficient even to establish that the City's police training was inadequate. Respondent did not even introduce expert testimony on what standards the City should have followed in training its police officers and in what respects the City's training program deviated from these standards. Expert testimony may be probative evidence of acceptable or standard police techniques. *See Tuttle*, 105 S.Ct. at 2437 (Brennan, J., concurring). The probity of expert testimony in cases involving police practice or technique has also been recognized by other courts. *See, e.g., Myers v. Town of Harrison*, 438 F.2d 293 (2d Cir.), *cert. denied*, 404 U.S. 828 (1971); *Heidbreder v. Northampton Township Trustees*, 64 Ohio App.2d 95, 411 N.E.2d 825 (Ct. App. 1979); *Selkowitz v. County of Nassau*, 45 N.Y.2d 97, 379 N.E.2d 1140 (1978). In this case, however, there was no such expert testimony. Absent direct evidence, there must at least be proof of other similar incidents in which foreseeable harm was directly traceable to training that was grossly negligent to the point of deliberate indifference. *See, e.g., Wellington v. Daniels*, 717 F.2d at 936 (a failure to supervise generally gives rise to liability only in those situations in which there is a history of widespread abuse). *See also Languirand v. Hayden*, 717 F.2d at 228-29.

In sum, the court of appeals erred when it upheld the jury's verdict against the City of Springfield in the absence of proof of any of the essential elements for municipal liability: (1) the adoption of a municipal policy of inadequate police training; (2) gross negligence—to the point of deliberate indifference—of the City's training policy; and (3) a causal connection between the alleged training inadequacy and the harm to Thurston.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the First Circuit.

Respectfully submitted,

DAVID O. STEWART
MICHAEL J. GERHARDT
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the Amici Curiae

May 15, 1986

AMICUS CURIAE

BRIEF

(6)

Supreme Court, U.S.
FILED
AUG 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF SPRINGFIELD, MASSACHUSETTS,
Petitioner,

v.

LOIS THURSTON KIBBE, ADMINISTRATRIX OF THE ESTATE OF CLINTON THURSTON,
Respondent.

~~MOTION FOR LEAVE TO FILE AND~~ BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF RESPONDENT

GROVER G. HANKINS,
General Counsel,
NAACP,
4805 Mt. Hope drive,
Baltimore, Maryland 21215,
(301) 358-8900,

JOHN D. EGNAL,
Professor,
Western New England,
College School of Law,
Springfield, Massachusetts
01119-2689.

The Daily Record Co., Baltimore, MD 21202

39pp

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985
NO. 85-1217

CITY OF SPRINGFIELD, MASSACHUSETTS,

Petitioner,

v.

LOIS THURSTON KIBBE, ADMINISTRATRIX OF THE ESTATE OF CLINTON THURSTON,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Introduction

The National Association for the Advancement of Colored People ("NAACP") hereby respectfully moves this Court for leave to file the attached brief as amicus curiae in support of respondent pursuant to Rule 36.2 of this Court's

Rules. The brief amicus curiae is being conditionally filed with this motion, copies of which have been served upon all parties. The written consents of Petitioner and Respondent are on file with the clerk. Accordingly, movants respectfully pray that the court grant permission to file the attached amicus curiae.

Dated: Baltimore, Maryland
July 30, 1986

Respectfully submitted,

Grover G. Hankins,
General Counsel,
NAACP.
4805 Mt. Hope Drive
Baltimore, Maryland
21215

John D. Egnal,
Professor,
Western New England
College School of Law
Springfield, Mass.
01119-2689

INTEREST OF THE AMICUS CURIAE

The National Association for the Advancement of Colored People ("NAACP") is a New York non-profit membership corporation. Its principal aims and objectives may best be understood by reference to its Articles of Incorporation:

> . . . voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.
>
> To ascertain and publish all facts bearing upon these subjects and to take any lawful action thereon; together with any and all things which may lawfully be done by a membership corporation...

The NAACP has a long-standing history of participating in the United States Supreme Court, both as a party and as amicus curiae, in cases presenting constitutional and statutory claims of racial discrimination.

The NAACP is vitally concerned with the issues raised in this appeal. Section 1983 rigorous standard of proof places an onerous burden on individuals who allege violation of constitutional rights by municipalities. This amicus curiae brief will show that neither the legislative history of section 1983 nor considerations of policy dictate a rule that requires proof of a government policy or custom in order to establish municipal liability. In this regard, we urge the Court to review its earlier pronouncements on this issue, and adopt the respondeat superior theory as the standard of proof in section 1983 cases.

TABLE OF CONTENTS

	PAGE
MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE	i
INTEREST OF THE AMICUS CURIAE	ii
TABLE OF AUTHORITIES	v
A. Part II of Monell reflects a compromise which, in light of subsequent developments, should be reexamined	3
B. The text and legislative history of section 1983 support respondeat superior liability for municipalities	16
C. Policy considerations support the adoption of respondeat superior liability for municipalities	20
CONCLUSION	27

TABLE OF AUTHORITIES

CASES

Allen v. McCurry, 449 U.S. 90 (1980)	12
Baker v. McCollan, 443 U.S. 137 (1979)	5
Bethel School District No. 403 v. Frases, 54 LW 5054 (1986)	1,6

	PAGE
Blair v. Shenandoah Women's Center, 757 F.2d 1435 (4th Cir. 1985)	14
Briscoe v. Lalhue, 460 U.S. 325 (1983)	12
Butz v. Economu, 438 U.S. 478 (1978)	14
California v. Cirarolo, 106 S.Ct. 1809 (1986)	8
Carey v. Piphus, 435 U.S. 247 (1978)	10
City of Los Angeles v. Heller, 106 S.Ct. 1571 (1986)	4,11
City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)	10
Clark v. Community for Creative Non-Violence, 104 S.Ct. 3065 (1984)	7
Conley v. Gibson, 355 U.S. 41 (1957)	13
Daniels v. Williams, 106 S.CT. 662 (1986)	9
Davidson v. Cannon, 106 S.Ct. 668 (1986)	9
Davis v. Scherer, 468 U.S. 183 (1984)	14

	PAGE
Eastway Const. Comp. v. City of New York, 762 F.2d 243 (2d Cir. 1985)	14
Elliot v. Perez, 751 F.2d 1472 (5th Cir. 1985)	13
Glanos v. Perse, 648 F.2d 679 (1st Cir. 1980)	13
Harlow v. Fitzgerald, 457 U.S. 800 (1984)	14
Hudson v. Palmer, 468 U.S. 517 (1984)	6
Illinois v. Gates, 462 U.S. 213 (1983)	8
Ingraham v. Wright, 430 U.S. 651 (1977)	6
Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985)	1
Malley v. Briggs, 106 S.Ct. 1092 (1986)	15,11
Memphis Community School District v. Stachura, 54 USLW 4771 (1986)	10
Migra v. Warren City School District, 465 U.S. 75 (1984)	12
Mitchell v. Forsyth, 105 S.Ct. 2806 (1985)	14

	PAGE
Monell v. Dept. of Social Social Services, 436 U.S. 658 (1978)	1,2,3,4,15 16,17,19,22 23,25,26
Monroe v. Pape, 365 U.S. 167	1,16,20,21
New Jersey v. P.L.O. 105 S.Ct. 733 (1985)	6
New York v. P.J. Video, Inc., 106 S.Ct. 1610 (1986)	7
Oklahoma City v. Tuttle, 105 S.Ct. 2427 (1985)	19,20,21
Oliver v. United States, 462 U.S. 213 (1983)	8
Owen v. City of Independence, 445 U.S. 622 (1980)	11,12
Parratt v. Taylor, 451 U.S. 527 (1981)	9,6
Smith v. Wade, 461 U.S. 30 (1983)	20,10
United States v. Mendenhall, 446 U.S. 544 (1980)	7
United States v. Ross, 456 U.S. 798 (1982)	7
University of Tennessee v. Elliot, 54 USLW 5084 (1986)	12

	PAGE
Wilson v. Garcia, 105 S.Ct. 1938 (1985)	12

Statutes and Constitutional Provisions

42 U.S.C.A. §1983	passim
FRCP	12,13

Books and Periodicals

E. McQuillen, Municipal Corporations, Vol. 18 Ch. 53 (3 ed. 1984)	24
State Government News, Vol 29 No. 3 (March/April 1986)	24
Police Leadership In America p. 235 (1985)(edited by W.Geller)..	27

MONELL PART II SHOULD BE OVERRULED; MUNICIPAL LIABILITY SHOULD BE BASED UPON RESPONDEAT SUPERIOR

Since 1961, when the wraps were taken off of §1983 by part II of Monroe v. Pape, 365 U.S. 167 (1961), this Court has labored mightily to define the contours of lawsuits brought under that section. This case involves one facet of that effort -- the liability of municipalities.

Throughout this litigation, the parties and the courts below have proceeded under the dicta from part II of Monell v. Department of Social Services, 436 U.S. 658, 694 (1978), that municipal liability required a showing "that the 'injuries (were) inflicted pursuant to government "policy or custom." ' " Kibbe v. City of Springfield, 777 F.2d 801, 803 (1st Cir. 1985). A properly instructed jury and both courts below found that the Monell

standard had been met. We believe, as respondent persuasively argues here, that under Monell the decision should be affirmed. However, we urge this Court to reconsider the Monell dicta, to overrule Monell part II, and to establish a respondeat superior standard for municipal liability.

We feel it is important to demonstrate why a reexamination of Monell is in order. As such, part A of this brief will analyze Monell in the context of the overall development of §1983 litigation. Most of these §1983 decisions, after recognizing that the text of the statute is not dispositive of the issue, deal first with the legislative history and then with the appropriate policy considerations. Thus, parts B and C of this brief will show that in light of the legislative history and policy, respondeat superior is the appropriate standard for determining

municipal liability.

A. Part II of Monell reflects a compromise which, in light of subsequent developments, should be reexamined

In 1961 when this Court in Monroe v. Pape held that municipalities were not "persons" under §1983, the scope of the §1983 action was only slightly more defined. As a result, there was an understandable reluctance on the part of the Monell Court, after correcting the error of Monroe, to hold municipalities responsible in every case where an individual employee was responsible. Thus the compromise of Monell part II must have seemed at the time to be a sensible middle ground. But developments since 1978 which have substantially limited the scope of the §1983 action provide an appropriate level of protection for "municipalities and their limited treasuries." Monell, 463 U.S. at 724 (Rehnquist, J., dissenting). Thus we submit the middle ground of Monell

part II is no longer needed.

These limitations on §1983 actions involve five areas: (1) scope of constitutional rights protected, (2) standard of defendant's conduct, (3) damages, (4) defenses, and (5) procedure. It should be noted at the outset that while many of the cases involve only individual defendants, in light of City of Los Angeles v. Heller, 106 S.Ct. 1571 (1986), the success of an individual defendant, other than on qualified immunity grounds, would clearly inure to the benefit of the municipality.

1. Scope of constitutional rights protected.

Justice Rehnquist's concern for municipal treasuries, quoted about from his dissent in Monell, was coupled with a concern that municipal officials would be unable "to predict the course of this Court's constitutional jurisprudence." 436 U.S. at 724. However weighty

such a concern might then have been to municipalities, there can be little doubt that in the last decade this Court's decisions have consistently narrowed the scope of constitutional rights in those areas which have traditionally given rise to §1983 litigation -- prisions, schools, free speech, and law enforcement.

In the area of prisoner litigation, Baker v. McCollan, 443 U.S. 137 (1979), is a prototypical illustration of the narrowing approach to the interpretation of the Constitution. The plaintiff, though at all times entirely innocent, was arrested by mistake pursuant to a "facially valid warrant" and held for eight days. His §1983 claim was dismissed by this Court on the ground that following the "valid" arrest, the Constitution only protected the plaintiff's right to bail and to a speedy trial. To the same effect

are Parratt v. Taylor, 451 U.S. 527 (1981) (deprivation of property) and Hudson v. Palmer, 468 U.S. 517 (1984)(privacy; intentional deprivation of property).

Section 1983 suits brought by public school students have produced a similar narrowing approach. While this Court continues to reaffirm the basic notion that the Constitution protects public school students, the case by case application of the Constitution has, over the last decade, consistently reduced the likelihood of successful §1983 litigation. See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977)(corporal punishment); New Jersey v. P.L.O., 105 S.Ct. 733 (1985)(search of student's locker); Bethel School District No. 403 v. Fraser, 54 LW 5054 (1986)(political speech by high school student for school office).

In Fraser, the Court rejected the

plaintiff's argument that his activity was protected by the First Amendment. Similarly, in New York v. P.J. Video, Inc., 106 S.Ct. 1610 (1986), the Court rejected the plaintiff's First Amendment argument and relaxed the probable cause standard for search warrants. See also Clark v. Community for Creative Non-Violence, 104 S.Ct. 3065 (1984), where the Court expanded the time, place and manner exception to the First Amendment.

Search and seizure is the area of law enforcement that most often gives rise to §1983 litigation. While the law of arrest, and the accompanying use of force, has remained fairly stable, this Court has actively narrowed the Fourth and Fourteenth Amendment protections in the search area. See, e.g., United States v. Mendenhall, 446 U.S. 544 (1980)(airport stop); United States v. Ross, 456 U.S. 798 (1982)(warrantless search of car and luggage);

Illinois v. Gates, 462 U.S. 213 (1983) (probable cause standard relaxed); Oliver v. United States, 466 U.S. 170 (1984)(no expectation of privacy in open fields); California v. Carney, 105 S.Ct. 2066 (1985) (warrantless search of motor home); California v. Ciraolo, 106 S.Ct. 1809 (1986) (aerial surveillance).

2. Standard of conduct: mere negligence is not actionable.

The cases just discussed involve a focus on whether the deprivation suffered by the citizen is one protected by the Constitution. If it is, then §1983 would provide a remedy; if not, the citizen must look to state tort law. The effect of the decisions has been to reduce the types of cases where a viable §1983 claim can be stated. Where the deprivation is of a protected right, it would seem to follow that §1983 would provide a

remedy, regardless of whether the deprivation was intended. However, last term, in the companion cases of Daniels v. Williams, 106 S.Ct. 662 (1986) and Davidson v. Cannon, 106 S.Ct. 668 (1986), this Court held clearly that mere negligence would not give rise to a claim based upon the Due Process Clause. Thus, even if a citizen is deprived, through state action, of life, liberty or property, §1983 does not provide a remedy if the state actor's conduct was only negligent. Moreover, in deciding these cases, the Court overruled the 1981 Parratt case, "to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment." Daniels, 106 S.Ct. at 665.

3. Damages

Although individual defendants in §1983

actions are subject to claims for both compensatory and punitive damages, Smith v. Wade, 461 U.S. 30 (1983), it is clear that municipalities are liable only for compensatory damages. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). With respect to the determination of compensatory damages, Memphis Community School District v. Stachura, 54 LW 4771 (1986) limits plaintiffs to damages for actual injuries. Stachura expands on Carey v. Piphus, 435 U.S. 247 (1978), which was thought by some to be limited to procedural, as opposed to substantive deprivations, and holds "that damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages in (§1983) cases." 54 LW at 4774.

4. Defenses.

In the case of individual defendants,

the most important defense is that of qualified immunity. In Malley v. Briggs, 106 S.Ct. 1092 (1986), this Court observed, "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." While municipalities are not entitled to the qualified immunity defense, Owen v. City of Independence, 445 U.S. 622 (1980), there is little indication that juries have returned verdicts against municipalities in cases where they have exonerated all of the individual defendants. Moreover, it is too early to gauge the full significance of City of Los Angeles v. Heller, 106 S.Ct. 1571 (1986).

Of course, a number of individual defendants have been held entitled to absolute immunity for §1983 suits. Generally, such immunity is available to participants in the

legislative and judicial processes. In Briscoe v. LaHue, 460 U.S. 325 (1983), the absolute immunity accorded witnesses was applied to police witnesses accused by the plaintiff of perjury. By contrast, in Malley v. Briggs, 106 S.Ct. 1092 (1986), a police officer whose application for a search warrant was approved by an absolutely immune magistrate was limited to qualified immunity.

More traditional defenses, for both individual and municipal defendants, may be available. See Wilson v. Garcia, 105 S.Ct. 1938 (1985)(statute of limitations); Allen v. McCurry, 449 U.S. 90 (1980)(issue preclusion); Migra v. Warren City School District, 465 U.S. 75 (1984)(claim preclusion); University of Tennessee v. Elliot, 54 LW 5084 (1986)(issue preclusion).

5. Procedure.

According to Rule 1, the Federal Rules

of Civil Procedure apply to "all suits of a civil nature . . . ." Nothing in the rules calls for special treatment for civil rights cases. Yet in recent years, the courts have, in several areas, fashioned procedural doctrines for the benefits of civil rights defendants.

Notwithstanding Conley v. Gibson, 355 U.S. 41 (1957) and Gomez v. Toledo, 446 U.S. 635 (1980), the lower federal courts have established a more rigorous standard for pleading in civil rights cases, especially where claims are asserted against municipalities. See, e.g., Glaros v. Perse, 628 F.2d 679 (1st Cir. 1980); Elliot v. Perez, 751 F.2d 1472, 1479-80 (5th Cir. 1985)(cases collected in footnotes 20 and 21). Elliot v. Perez, supra, reflects as well the growing trend toward the use of Rule 11 to discourage frivolous, and arguably marginal civil rights

suits. Id. at 1480-82. See also Eastway Const. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); Blair v. Shenandoah Women's Center, 757 F.2d 1435 (4th Cir. 1985).

In the area of summary judgment, this Court has developed a special approach for the benefit of civil rights defendants. Butz v. Economou, 438 U.S. 478, 508 (1978), calls for a "firm application of the Federal Rules of Civil Procedure", in order to enhance the ability of civil rights defendants to prevail on motions for summary judgment. Harlow v. Fitzgerald, 457 U.S. 800 (1982), altered the standard for qualified immunity by eliminating the subjective portion of the test, again in order to enhance the ability of civil rights defendants to prevail on motions for summary judgment. See also Davis v. Scherer, 468 U.S. 183 (1984) and Mitchell v. Forsyth, 105 S.Ct. 2806 (1985)

(Butz and Harlow applied; lower court decisions for plaintiffs reversed).

6. Conclusion.

Under Monell part II, §1983 plaintiffs can still prevail in some cases, such as this one, against both individual defendants and municipalities. In others, recovery will be limited to the individual defendants. As Justice White observed in Malley v. Briggs, 106 S.Ct. 1092, 1096 (1986), violations will result from conduct of "the plainly incompetent or those who knowingly violate the law." The issue, we submit, is whether the Court will continue to allow these core §1983 claims to become effectively worthless, by limiting recovery to individual defendants. To reiterate, Monell part II reflects a compromise between the erroneous extreme of Monroe part III and the proper standard of respondeat superior. However sound that

compromise seemed in 1978, we submit that the foregoing discussion demonstrates convincingly that municipal treasuries are adequately protected, and that a "fresh analysis" of the legislative history and applicable policies is in order.

B. The text and legislative history of §1983 support respondeat superior liability for municipalities

The original basis for municipal immunity, born in 1961 by part III of Monroe and buried in 1978 by part I of Monell, was that municipalities were not "persons" under §1983. While supported superficially by the text of the statute, the nearly contemporaneous Dictionary Act undermines a serious textual argument. The rationale for Monroe part III was based upon an analysis of the legislative history, specifically the rejection by the Congress of §1871 of the Sherman Amendment.

In part I of Monell, Justice Brennan

demonstrated convincingly why reliance on the rejection of the Sherman Amendment was irrelevant to the interpretation of the word "person" in §1983. First, the Amendment was a proposed new section of the Act of 1871, not an amendment to the language of §1983. Moreover, the Sherman Amendment would have created a separate basis for municipal liability, and would have been available to anyone whose rights were violated within a municipality's territory, even if the perpetrators were outsiders and even if the municipality was powerless to prevent the violation, or even tried and failed to prevent the violation. Even in dissent, Justice Rehnquist did not seriously challenge the soundness of the analysis of Monell part I, but rather focused on the stare decisis argument.

Although part I of Monell fully disposed of the issues raised, the Court went on in

part II to announce its compromise. Municipalities would only be liable if the deprivation resulted from "the government's policy or custom." The only rationale offered for this limitation on municipal liability, created out of whole cloth and attributed to the statutory words "shall subject, or cause to be subjected," was the very same rejection of the Sherman Amendment that a few pages earlier had been persuasively shown to have nothing to do with the interpretation of §1983. Specifically, the Court states that since two reasons generally offered to support respondeat superior in tort law (reducing accidents and spreading costs) were also offered to support the Sherman Amendment, rejection of the Sherman Amendment necessarily implied rejection of respondeat superior liability for municipalities. The fallacy of this reasoning is obvious. Overlooked

is the central distinction between respondeat superior liability, which could only arise from the acts of those employed by and under the control of the municipality, and Sherman Amendment liability, which would have arisen each time constitutional rights were violated within the municipality, even if by outsiders (such as Klan members) and even if the municipality was powerless to prevent the violations.

Absent from Monell part II is any reference to the status of the doctrine of respondeat superior as it existed under the common law at the time. Justice Stevens, in his dissent in Oklahoma City v. Tuttle, 105 S.Ct. 2427 (1985), makes it clear that the common law was well settled at the time.

> At the time the statute was enacted the doctrine of respondeat superior was well recognized in the common law of the several states and in England. An employer

> could be held liable for the wrongful acts of his agents, even when acting contrary to specific instructions, and the rule had been specifically applied to municipal corporations, and to the wrongful acts of police officers. Id. at 2442 (footnotes omitted)

This is not a situation like Smith v. Wade, 461 U.S. 30 (1983), where Justice O'Connor aptly characterized the opinions of Justices Brennan and Rehnquist as a "battle of the string citations (which) can have no winner." 461 U.S. at 93. Rather, this is an issue where "there was a generally prevailing rule of common law," Id. That rule, respondeat superior, and not one fabricated from whole cloth, should be applied.

C. Policy considerations support the adoption of respondeat superior liability for municipalities

In part III of Monroe v. Pape, the Court saw its choices as municipal immunity or municipal liability under respondeat superior. See Tuttle, 105 S.Ct. at 2442 n.4 and 2446

n.21 (Stevens, J., dissenting). The Monroe Court recognized there were compelling policy reasons to support respondeat superior liability, but stated: "We do not reach those policy considerations." 365 U.S. at 191. In part III of his dissent in Tuttle, Justice Stevens effectively and concisely articulated those policy considerations:

> In a number of decisions construing §1983, the Court has considered whether its holding is supported by sound consideration of policy. In this case, all of the policy considerations that support the application of the doctrine of respondeat superior in normal tort litigation against municiapl corporations apply with special force because of the special quality of the interests at stake. The interest in providing fair compensation for the victim, the interest in deterring future violations by formulating sound municipal policy, and the interest in fair treatment for individual officers who are performing difficult and dangerous work, all militate in favor of placing primary responsibility on the municipal corporation.

> The Court's contrary conclusion can only be explained by a concern about the danger of bankrupting municipal corporations. That concern is surely legitimate, but it is one that should be addressed by Congress -- perhaps by imposing maximum limitations on the size of any potential recovery or by requiring the purchase of appropriate liability insurance -- rather than by this Court. Moreover, it is a concern that is relevant to the law of damages rather than to the rules defining the substantive liability of "every person" covered by §1983.
>
> The injection into §1983 litigation of the kind of debate over policy that today's decision will engender can only complicate the litigation process. My rather old-fashioned and simple approach to the statute would eliminate from this class of civil-rights litigation the time consuming "policy" issues that Monell gratuitously engrafted onto the statute. Of greatest importance, it would serve the administration of justice and effectuate the intent of Congress. 105 S.Ct. at 2446-47 (footnotes omitted).

We would elaborate briefly on several of Justice Stevens' points. Monell's adverse impact on the complexity of litigation occurs

in two respects. First, the doctrine itself has proved to be far more elusive than anyone could have imagined in 1978. After nearly ten years, there are far more legal questions than answers, with trial courts trying to anticipate courts of appeal, who in turn must try to anticipate the decisions of this Court. Second, because the Monell doctrine requires the litigation to focus on matters other than the incident that gave rise to the injuries, both discovery and trial are far more complicated than if respondeat superior obtained. A ripple effect of these phenomona is a negative impact on the likelihood these cases can be settled prior to trial.

The first part of this brief addressed, from a different perspective than Justice Stevens, the concern for the municipal treasuries. We would add here one additional point. While there is little doubt that many

municipalities are in difficult economic situations, due to adverse court judgments, it does not follow that these are civil rights judgments. A substantial cause of municipal liability is ordinary tort suits, litigated under state law, in state courts. See generally, State Government News, Vol. 29, No. 3 (March/April 1986)(entire issue devoted to the government liability crisis; virtually no mention of liability for civil rights violations); 18 E. McQuillen, Municipal Corporations, Ch. 53 (3d ed. 1984).

A shift to respondeat superior liability in §1983 litigation would undoubtedly result in municipalities losing some cases they would win under Monell part II. In other cases, such as this one, the plaintiff would prevail under either standard. Although under the change in standard we urge, municipalities would lose some additional cases, it is not

clear they will be any worse off financially. Under a respondeat superior standard, the cases will be easier to prepare, easier to settle and easier to try. Thus, the municipalities' costs of litigation will be reduced. For similar reasons, if they lose, their obligation under §1983 to pay plaintiff's attroneys fees will be reduced. Moreover, with the unmistakable message to municipalities that would result from a decision to overrule Monell, municipalities, like any sensible employer, will take steps to train and supervise their employees so as to reduce and hopefully eliminate violations of constitutional rights.

Perhaps, in cases like the present one, some of the funds now allocated to litigation would be instead used to improve the training, education and supervision of municipal employees. In a recent article, Wayne W. Schmidt,

Executive Director of Americans for Effective Law Enforcement, stated:

> Although it is not hard to find negative police perceptions of the impact of section 1983, progressive police leaders will enumerate the positive aspects of increased liability:
>
> 1. More departments are placing greater emphasis on comprehensive background investigations -- including psychological screening -- to eliminate applicants with a propensity for violence or other misbehavior.
> 2. Officers accused of serious misconduct often are placed on administrative leave or assigned to cloistered settings pending disposition of any disciplinary proceedings and civil litigation; unfortunately, however, a suit may drag on for years.
> 3. Police administrators, anxious to avoid allegations of "negligent retention of a known unfit," are apt to act more promptly to charge an errant officer and to seek the ultimate sanction of termination.
> 4. Sergeants and watch commanders are given specialized training that emphasizes the attendant liability for their negligent failure to supervise subordinates adequately.

> 5. Cities and counties are noting that under Monell v. Department of Social Services (1978) a city can be sued in federal court for inadequate training of its officers, and that under Owen v. City of Independence (1980) the defense of good faith is no longer available to the government entity.

Police Leadership in America (1985, edited by W. Geller), at p. 235. Such recognition by the law enforcement community of the positive aspects of increased municipal liability under Monell would apply equally to respondeat superior liability. This, and other developments discussed herein demonstrate, we submit, that the policies favoring respondeat superior liability have grown stronger in recent years.

CONCLUSION

We believe that under Monell part II, the judgment of the courts below should be affirmed. We contend, for the reasons herein presented, that it would be far better to reach the same result by overruling Monell

part II and establishing respondeat superior as the standard for municipal liability under §1983.

Respectfully submitted,

Grover G. Hankins,
General Counsel,

NAACP
4805 Mt. Hope Drive,
Baltimore, Maryland,
21215
(301) 358-8900.

John D. Egnal,
Professor,
Western New England
College School of Law
Springfield, Mass.
01119-2689

AMICUS CURIAE

BRIEF

No. 85-1217

IN THE
UNITED STATES SUPREME COURT

October Term, 1985

CITY OF SPRINGFIELD, MASSACHUSETTS

Petitioner

v.

LOIS THURSTON KIBBE, ADMINISTRATRIX of
the Estate of CLINTON THURSTON

Respondent

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION and THE CIVIL LIBERTIES UNION OF MASSACHUSETTS

TABLE OF CONTENTS

Pages

Table of Authorities ii

Argument 7

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE THE PETITIONER FAILED TO RAISE THE ISSUES PRESENTED HERE IN THE LOWER COURTS. 7

II. A MUNICIPALITY MAY BE LIABLE UNDER 42 U.S.C. §1983 FOR CONSTITUTIONAL VIOLATIONS WHICH ARE CAUSED BY INADEQUATE TRAINING OF ITS POLICE OFFICERS. 15

A. Inadequate Training of Police Officers May Cause A Constitutional Deprivation. 15

B. Municipal Liability For Inadequate Training Serves the Purposes Intended by this Court In Monell. 28

C. A City May Be Liable for Constitutional Violations Caused by its Gross Negligence in Training its Police Officers.35

D. TUTTLE DOES NOT REQUIRE REVERSAL HERE. 40

Conclusion 42

TABLE OF AUTHORITIES

Pages

CASES

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 22

Andersen v. City of Bessemer City, North Carolina, ___ U.S. ___, 105 S.Ct. 1504 (1985) 42

City of Los Angeles v. Heller, ___ U.S. ___, 106 S.Ct. 1571 (1986) 18

City of Newport v. Fact Concerts, Inc., 453 U.S. 255 (1981) 12

City of Oklahoma City v. Tuttle, ___ U.S. ___, 105 S.Ct. 2427 (1985) 13, 15, 17, 20, 36, 40

City of Riverside v. Rivera, ___ U.S. ___, 54 U.S.L.W. 4843 (June 27, 1986) 42

Fiacco v. City of Rensselaer, 783 F.2d 319 (2d Cir. 1986) . . . 22, 27, 28

Galloway v. United States, 319 U.S. 372 (1943) 41

Gilmere v. City of Atlanta, 774 F.2d 1498 (11th Cir. 1985)(en banc) cert. denied 54 U.S.L.W. 3761 (May 19, 1986) . . . 23

Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985) . . . 23, 28

TABLE OF AUTHORITIES-Continued

Pages

CASES

Hays v. Jefferson County, Kentucky, 668 F.2d 869 (6th Cir.) cert. denied 459 U.S. 833 (1982) 23

Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981) 23, 38

Jartech, Inc. v. Claney, 666 F.2d 403 (9th Cir. 1982) 9, 11

Johnson v. Bryant, 671 F.2d 1276 (11th Cir. 1982) 9

Johnston v. Holiday Inns, Inc., 565 F.2d 790 (1st Cir. 1977) 9, 11

Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985) 40

Lanquirand v. Hayden, 717 F.2d 220 (5th Cir. 1983) 8

Leite v. City of Providence, 463 F.Supp. 585 (D.R.I. 1978) 26

McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979) 23, 38

Monell v. Department of Social Services, 436 U.S. 658 (1978) . . .passim

Monroe v. Pape, 365 U.S. 167 (1961)..15, 24

Morris v. Travisono, 528 F.2d 856 (1st Cir. 1976) 9, 11

TABLE OF AUTHORITIES-Continued

Pages

CASES

Owen v. City of Independence, Missouri, 445 U.S. 622 (1980) . . . 28, 29, 32, 36

Owens v. Haas, 601 F.2d 1242 (2nd Cir.) cert. denied 444 U.S. 980 (1979).. 22, 38

Payton v. New York, 445 U.S. 5773 (1980)..21

Pembaur v. City of Cincinnati, 106 S.Ct. 1292 (1986) 39

Polk County v. Dodson, 454 U.S. 312, 326 (1981) 15

Rizzo v. Goode, 423 U.S. 362 (1976) . . . 8

Rymer v. Davis, 775 F.2d 756 (after remand), 754 F.2d 198 (6th Cir. 1985) vacated and remanded sub. nom..23, 28, 38

City of Sheperdsville, Kentucky v. Rymer, ___ U.S. ___, 105 S.Ct. 3518 (1986). . 23

Spanish Action Committee of Chicago v. City of Chicago, 766 F.2d 315 (7th Cir. 1985) 9, 10

Tennessee v. Garner, ___ U.S. ___, 105 S.Ct. 1694 (1985) 20

United States v. United States District Court, 407 U.S. 297 (1972)(Keith) . . 22

TABLE OF AUTHORITIES-Continued

Pages

CASES

Voutour v. Vitale, 761 F.2d 812 (1st.Cir. 1985) cert. denied ___ U.S. ____, 106 S.Ct. 879 (1986) . . . 22

Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983) 8, 23

Wierstak v. Heffernan, 789 F.2d 968 (1st Cir. 1986) 27, 38

STATUTES

42 U.S.C. §1983 . . . . . 1, 15, 16, 22, 33

OTHER AUTHORITIES

Cong. Globe, 42d Cong. 1st Sess. 367-68 (1871) 25

Fazo, Use of Deadly Force, The Police Chief, 54 (August 1985) 33

Geller, "15 Shooting Reduction Techniques: Controlling the Use of Deadly Force By and Against Police Officers," The Police Chief, 56 (August 1985) 33

Schmidt, Section 1983 and the Changing Face of Police Management, in Police Leadership in America 235 (W. Geller ed. 1985)(hereinafter, Schmidt) 32, 34

TABLE OF AUTHORITIES-Continued

Pages

OTHER AUTHORITIES

Schofield, "Law Enforcement and Government Liability, An Analysis of Recent Section 1983 Litigation," FBI Law Enforcement Bulletin, (January, 1981) 32

Scuro, "Recent Developments in Government liability under 42 U.S.C. 1983," The Police Chief, 20 (April 1982) 33

Wright and Miller, Federal Practice and Procedure §2524, 543-544 41

Americans for Effective Law Enforcement, Southwestern Law Enforcement Institute and the International Association of Chiefs of Police. 37 Crim.Law.Rptr. 2460, 2408, 2356, 2316 and 2060 (1985) 33

Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcement Misconduct, 87 Yale L.J. 447, 455-458 (1978) 34

Suing the Police in Federal Court, 88 Yale L.J. 781, 812-814 (1979) 29

McCoy, Enforcement Workshop: Lawsuits Against Police - What Impact Do they Really Have?, 20 Crim.L. Bulletin, 49, 50-51 n.7 (1984) 30

"New Questions Arise on Policing Police," N.Y. Times, April 3, 1983 30

"Police Agencies Seek Ways to Avoid Citizen's Lawsuits." N.Y. Times November 3, 1985 30

INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The Civil Liberties Union of Massachusetts (CLUM) is one of its state affiliates.

The American Civil Liberties Union has long worked to defend basic constitutional rights and, in so doing, has in recent years filed briefs, as counsel for a party or as amicus curiae, in many cases that required construction of the statute, 42 U.S.C. §1983, at issue in this case. Both the ACLU and CLUM have been particularly concerned about constitutional deprivations caused by police practices.

issues regarding the standards for the imposing municipal liability for unconstitutional police conduct, the ACLU and CLUM wish to present their experience and views for the Court's consideration.

The parties consented to our participation, indicated by letters we have lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Amici adopt the statement of the case presented by respondent.

SUMMARY OF ARGUMENT

In the first section of this brief, amici argue that this petition does not properly raise the issue of whether a municipality may be liable under §1983 for inadequate training of its police or whether the proper standard for such liability is gross negligence. Because the jury instruction on these issues was in accordance with the petitioner's requested instruction the City cannot now object to the propriety of that instruction.

Should this Court reach the issue of whether inadequate training of police officers may be a basis for municipal liability under §1983, it should determine that it may. When a municipality's inadequate training of police officers is found to be the constitutional

violation, a municipality should be liable for such a violation. During the eight years since the decision in Monell v. Department of Social Services, 436 U.S. 658 (1978), the overwhelming majority of federal courts have held that municipalities may be liable for inadequate training of police officers. As a result of this rule police training has improved and municipalities have established procedures designed to prevent future police misconduct. These desirable results support the need for municipal liability for failure to train police officers.

Finally, to the extent proof of a level of municipal culpability is necessary for a Monell claim, it is met

gross negligence in training police officers. This standard both serves the policy goals of deterring civil rights violations and compensating victims of such violations, and provides a workable standard of care for municipalities.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE THE PETITIONER FAILED TO RAISE THE ISSUES PRESENTED HERE IN THE LOWER COURTS.

In its petition for certiorari and its brief the City of Springfield asks this Court to rule that "(i)nadequate training of police officers is not a viable theory of municipal liability under Monell v. Department of Social Services, 436 U.S. 658 (1978)," and that "gross negligence is insufficient to establish a municipal policy." See, Petitioner's Brief at 8, 15. But these issues are not properly presented since they are raised for the first time in this Court. Indeed at trial - in direct

contrast to its position in this Court - the City requested an instruction containing the very legal standard it now objects to.

The City of Springfield requested a jury instruction including the following:

> It is not the City's burden of proving its training was adequate, but rather, it is the plaintiff's burden to prove the City's training was inadequate.
>
> Further, the plaintiff has the burden of proving the City was not merely negligent in its training, but grossly negligent in failing to train its police officers. Langquirand v. Hayden, 717 F.2d 220 (5th Cir. 1983); Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983).
>
> In order to find the City of Springfield liable for negligently training its police officers, you must also find that the negligent training was the proximate cause of plaintiff's injuries.
>
> The City of Springfield may not be held liable for civil rights violation due to the mere fact that the City was supervising a person who caused the violation. Rizzo v. Goode, 423 U.S. 362 (1976).

(App. 28-29)

Rule 51 of the Federal Rules of Civil Procedure requires that a party object to an error in an instruction before the jury retires to consider its verdict. Many cases have held that there can be no appeal from an improper instruction when there has been no objection to the instruction. E.g. Johnston v. Holiday Inns, Inc., 565 F.2d 790 (1st Cir. 1977); Morris v. Travisono, 528 F.2d 856 (1st Cir. 1976); Spanish Action Committee of Chicago v. City of Chicago, 766 F.2d 315 (7th Cir. 1985); Jartech, Inc. v. Claney, 666 F.2d 403 (9th Cir. 1982); Johnson v. Bryant, 671 F.2d 1276 (11th Cir. 1982). The purpose of this rule is to encourage parties to raise all points at trial and to permit the trial judge to correct any

error in the charge. Spanish Action Committee of Chicago v. City of Chicago, 766 F.2d at 319.

It would be extraordinary to permit the City to argue on appeal that it was judged by the incorrect standard when the City requested an instruction permitting liability based on the same language which it now claims was erroneous. If this is permitted, a party could benefit by misleading the trial court into giving erroneous instructions as insurance for an appeal.[1/] A party cannot object to the fact that an instruction was given

---

1/ If a party feels that no instruction should be given on a topic but wishes to suggest language if an instruction is going to be given, the proper procedure is to object to any instruction on that topic and, without waiving the objection, propose an instruction.

in an area of law when the objecting party requested such an instruction. Johnston v. Holiday Inns, Inc., 565 F.2d at 797; Jartech, Inc. V. Claney, 666 F.2d at 407. A party cannot complain if an instruction which is substantially similar to its request is given. Wright & Miller, Federal Practice and Procedure §2558, 675.

The plain error exception to Rule 51 does not apply here since the instruction as given was consistent with the decisions of the vast majority of the Courts of Appeal and precedent in this Court as discussed below. The plain error rule "should be applied sparingly and only in exceptional cases or under peculiar circumstances to prevent a miscarriage of justice." Morris v. Travisono, 528 F.2d at 859.

BEST AVAILABLE COPY

This case does not present the type of consideration below which this Court relied upon in reviewing an instruction to which no objection was made permitting an award of punitive damages against a municipality in City of Newport v. Fact Concerts, Inc., 453 U.S. 255 (1981). In Fact Concerts the punitive damages issue "was squarely presented and decided on a complete trial record by the court of first resort" and was argued to the court of appeals. Id. at 257. In the present case the petitioner proposed an instruction in the district court which was similiar to the instruction given and also failed to raise any objection

BEST AVAILABLE COPY

to this portion of the instruction in the court of appeals.[2/]

The contours of a Monell claim were very uncertain at the time of the Fact Concerts decision, which was only three years after Monell. Now that eight years have passed since Monell and the parameters of Monell have been established more clearly, eight of the courts of appeals have considered whether

---

2/ On appeal the City primarily argued insufficiency of the evidence. The only other claims were based on the claimed failure of the instruction to indicate that liability could not be based on an isolated incident of negligent training and the alleged insufficiency of the instruction regarding causation. Thus this case is distinguishable from City of Oklahoma City v. Tuttle, ___ U.S. ___, 105 S.Ct. 2427, 2432 (1985) where the City failed to object to an instruction yet plaintiff made no Rule 51 argument when the issue was argued at the court of appeals.

failure to train police officers may be a policy or custom under Monell and they have agreed that, at some point, it may. See, Argument II, supra. Since the circuit courts are in agreement on the central issue raised by the City here, there are no special circumstances which require a decision by this Court now.

There is no basis for the City to argue issues here when it completely failed to do so in the lower courts. The writ of certiorari should thus be dismissed as improvidently granted.

II. A MUNICIPALITY MAY BE LIABLE UNDER 42 U.S.C. §1983 FOR CONSTITUTIONAL VIOLATIONS WHICH ARE CAUSED BY INADEQUATE TRAINING OF ITS POLICE OFFICERS.

A. Inadequate Training of Police Officers May Cause A Constitutional Deprivation.

In Monell v. Department of Social Services, supra, this Court held that municipalities may be liable under 42 U.S.C. §1983, reversing Monroe v. Pape, 365 U.S. 167 (1961), on this point. Monell permits municipal liability when a municipal policy or custom is the "moving force" behind a constitutional violation.[3/] Id. at 694-695; Polk County v. Dodson, 454 U.S. 312, 326 (1981). In City of Oklahoma City v. Tuttle, ___ U.S. ____, 105 S.Ct. 2427 (1985), a majority of this Court agreed that municipal liability cannot be

---

3/ Amici understand the Court's use of "moving force" to imply traditional tort principles of causation.

imposed "solely upon proof that it [the city] employed a nonpolicy-making officer who violated the Constitution." 105 S.Ct. at 2437 (plurality) and at 2440 (Brennan, J. concurring). The plurality decision in Tuttle explicitly left open the question whether a policy of inadequate training of police which causes a constitutional deprivation can impose municipal liability under Monell. 105 S.Ct. at 2436 n.7.

Our analysis of this issue begins with the statute, 42 U.S.C. §1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunity secured by the Constitution and laws, should be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

By the terms of §1983 a plaintiff must prove that:

> (1) a person (2) acting under color of state law (3) subjected the plaintiff or caused the plaintiff to be subjected (4) to the deprivation of a right secured by the Constitution and the laws of the United States.

City of Oklahoma City v. Tuttle, 105 S.Ct. at 2439 (Brennan, J. concurring).

There is no question in this case that the City of Springfield is a "person" under §1983. Monell v. Department of Social Services, supra. It also is not questioned that the actions of the City concerning police training were taken under color of state law. Likewise, the fact that a constitutional violation occurred is not in doubt: a judgment entered against an individual police officer from which there was no appeal. The only issue here is whether the City caused the

constitutional violation which admittedly occurred.[4/]

A city can cause a constitutional violation just as surely by its omissions as by its affirmative acts.[5/] The constitutional rules which police officers must follow are not always intuitively obvious to the uneducated citizen. Frequently they represent decisions made by this Court

---

4/ Determining whether there is a causal connection to a city policy or custom is a separate inquiry from the determination of whether a constitutional right was violated. A city cannot be liable to an injured person if the person's constitutional rights were not violated. City of Los Angeles v. Heller, ___ U.S. ___, 106 S.Ct. 1571, 1573 (1986).

5/ Indeed, it is simply a question of semantics as to whether this case involves acts or omissions. Assigning untrained officers to street patrol is an affirmative act, while having failed to train them is an omission.

in an effort to balance conflicting social goals or constitutional principles. However, this body of law easily may be taught to law enforcement officers. Given that, there is no substantive difference between a constitutional violation caused by a municipal policy or custom directing a police officer to violate a person's constitutional rights, and a constitutional violation caused by the municipality's failure to inform a police officer of constitutional rules limiting his or her power.

The point is readily appreciated by considering police use of deadly force. The need for special rules regulating when police officers may employ deadly force has been recognized by this

Court.[6] In Tennessee v. Garner, the Court held that "the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." ___ U.S. ___, 105 S.Ct. 1694, 1701 (1985).

Under the City's view of municipal liability the constitutional principle established in Tennessee v. Garner could be circumvented by a police department's failure to train police officers adequately in the use of deadly force. It is unlikely that any police department would, after the Garner decision, establish a policy explicitly permitting police officers to use deadly force to

---

6/ It is noteworthy that police use of deadly force has been before this Court frequently during the past several terms. See, Tennessee v. Garner, supra; City of Oklahoma City v. Tuttle, supra; and the present case.

prevent the escape of unarmed non-dangerous suspects. But if police officers are not trained to comply with this limitation on their power and disciplined when they do not comply, it is foreseeable that an improperly trained police officer will shoot and kill a suspected car thief, looter or some other non-dangerous fleeing suspect. When a municipal policy or custom of inadequately training police is found to cause a constitutional deprivation, the municipality should be liable for the consequences.[7]

7/ Numerous examples could be adduced to demonstrate this point. Wholesale violations of constitutional rights could be caused if law enforcement officers were not trained as to when they could enter a private home to conduct a search for a person, cf., Payton v. New York, 445 U.S. 5773 (1980); as to the fact that a warrant is

(Continued On Next Page)

The City claims that a municipality may never be liable under 42 U.S.C. §1983 for inadequate training of its police officers. However, every one of the circuit courts which has reached this issue has disagreed, ruling that at some point a failure to properly train police officers may cause a constitutional deprivation thereby subjecting a municipality to liability.[8/]

7/ (Continued From Previous Page) required to conduct electronic surveillance, cf., United States v. United States District Court, 407 U.S. 297 (1972)(Keith); or as to when "border searches" may be conducted to look for illegal aliens, cf., Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

8/ Voutour v. Vitale, 761 F.2d 812 (1st.Cir. 1985) cert. denied ___ U.S. ____, 106 S.Ct. 879 (1986); Owens v. Haas, 601 F.2d 1242 (2nd Cir.) cert. denied 444 U.S. 980 (1979); Fiacco v. City of (Continued On Next Page)

The City has not cited a single case in support of its argument that failure to train police officers properly may never subject a municipality to §1983 liability. Even the amicus brief filed in support of the petitioner does not contest the proposition that failure to train police officers may subject a

---

8/ (Continued From Previous Page) Rensselaer, 783 F.2d 319 (2d Cir. 1986); Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983); Grandstaff v. City of Borger, Texas, 767 F.2d 161, 170 (5th Cir. 1985); Rymer v. Davis, 775 F.2d 756 (after remand), 754 F.2d 198 (6th Cir. 1985) vacated and remanded sub. nom City of Shepherdsville, Kentucky v. Rymer, ___ U.S. ____, 105 S.Ct. 3518 (1986); Hays v. Jefferson County, Kentucky, 668 F.2d 869, 874 (6th Cir.) cert. denied 459 U.S. 833 (1982); Herrera v. Valentine, 653 F.2d 1220, 1224 (8th Cir. 1981); McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979); Gilmere v. City of Atlanta, 774 F.2d 1498, 1503-1504 (11th Cir. 1985)(en banc) cert. denied 54 U.S.L.W. 3761 (May 19, 1986).

municipality to liability for resulting constitutional deprivations.

The legislative history of §1983 makes clear that when the statute was enacted in 1871, Congress was concerned not only with blatantly unconstitutional policies and customs, but also with more subtle constitutional violations resulting from failure to comply with facially constitutional statutes. "It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind [the statute]." Monroe v Pape, 365 U.S. at 174-75. Representative Sheldon, in arguing for passage of the statute said:

> It must be apparent that these amendments enlarge the power of the Government in controlling the action of the States and I believe that it can extend its power, through its courts, in times of peace, directly

> to the individual who is deprived of his rights, ... whether through the positive act or the default of the State authorities.

Cong. Globe, 42d Cong. 1st Sess. 367-68 (1871)(emphasis added).

The problem addressed by Congress in 1871 continues to this day. Most modern police departments do not explicitly adopt blatantly unconstitutional policies and procedures. However, constitutional violations by police officers may result just as surely due to the municipality's failure to train them properly.

Soon after this Court decided Monell, a district court addressing this issue held that failure to train police officers can subject a municipality to liability for constitutional violations caused by the failure:

> If a municipality completely fails to train its police force, or trains its officers in a reckless or

> grossly negligent manner so that future police misconduct is almost inevitable, the municipality exhibits a 'deliberate indifference' to the resulting violations of a citizen's constitutional rights. In such a case, the municipality may fairly be termed as acquiescing in and implicitly authorizing such violations . . . . The training and supervising of these police officers must be so inadequate and the resulting misconduct so probable, that the city can fairly be considered to have acquiesced in the probability of serious police misconduct.

Leite v. City of Providence, 463 F.Supp. 585, 590-591 (D.R.I. 1978).

This reasoning was persuasive to many other courts which accepted the concept of municipal liability for inadequate training. See cases cited at pp. 23-24, n.8, supra. This theory permits municipal liability only for acts or omissions of the city or town

and is consistent with the analysis of Monell.[9/]

The First, Second, Fifth and Sixth Circuits have decided this issue since Tuttle and have agreed that failure to train police properly may be sufficient to establish a Monell claim. Wierstak

---

9/ The Tuttle plurality opinion lends support to a Monell claim for failure to train even though Tuttle did not expressly decide the point. Counsel for the respondent in Tuttle argued that the record contained more evidence of an official policy of inadequate training than merely a single incident of excessive force by a police officer. The plurality responded stating, "unfortunately for respondent, the instruction . . . allowed the jury to impose liability on the basis of such a single incident . . . ." 105 S.Ct. at 2435 (emphasis added) If the jury had been properly instructed in Tuttle, this Court might well have given favorable consideration to the respondent's position on training. See, Fiacco v. City of Rensselaer, 783 F.2d at 327.

v. Heffernan, 789 F.2d 968 (1st Cir. 1986); Fiacco v. City of Rensselaer, supra; Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985); Rymer v. Davis, 775 F.2d 756 (6th Cir. 1985).

B. Municipal Liability For Inadequate Training Serves the Purposes Intended by this Court In Monell

In Owen v. City of Independence, Missouri, 445 U.S. 622 (1980), this Court held that a municipality is not entitled to the qualified immunity defense under §1983 which is available to individuals, emphasizing the importance of compensatory damages in vindicating constitutional rights. In Owen this Court said that §1983 is "to serve as a deterrent against future constitutional deprivations . . .," 445 U.S. at 651, and added:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed

> in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policy making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.

Id. at 651-52 (footnote omitted) (emphasis added).

Eight years after Monell, litigation against municipalities for failure to train police officers has begun to have the effect sought in Owen of improving police training and procedures. A study of the effects of police misconduct litigation which was conducted before Monell concluded that few changes in police practices occurred due to these suits. Note, Suing the Police in Federal Court, 88 Yale L.J. 781, 812-814

(1979). A more recent article, by contrast, notes the impact of civil rights litigation on increased review of police procedures, supervision and internal review which is attributed to the imposition of municipal liability. McCoy, Enforcement Workshop: Lawsuits Against Police - What Impact Do they Really Have?, 20 Crim.L. Bulletin, 49, 50-51 n.7 (1984).10/

A recent article by the Executive Director of Americans for Effective Law

---

10/ Newspaper articles confirm this phenomenon. See, e.g. "New Questions Arise on Policing Police," N.Y. Times, April 3, 1983 (The Justice Department's Community Relations Service "has recently been inundated with requests for assistance from local governments, seeking municipal liability training and protection. Several police departments have re-examined and altered their firearms policies."); "Police Agencies Seek Ways to Avoid (Continued On Next Page)

Enforcement, an organization which provides training to police agencies throughout the country, concludes that progressive police officials agree on the following positive effects of increased liability under Section 1983:

1. More departments are placing greater emphasis on comprehensive background investigations-including psychological screening-to eliminate applicants with a propensity for violence or other misbehavior.

2. Officers accused of serious misconduct often are placed on administrative leave or assigned to cloistered settings pending disposition of any disciplinary proceedings and civil litigation; unfortunately, however, a suit may drag on for years.

3. Police administrators, anxious to avoid allegations of 'negligent retention of a known unfit,' are apt to act more promptly to charge an errant officer and to seek the ultimate sanction of termination.

10/ (Continued From Previous Page) Citizen's Lawsuits." N.Y. Times November 3, 1985.

4. Sergeants and watch commanders are given specialized training that emphasizes the attendant liability for their negligent failure to supervise subordinates adequately.

5. Cities and counties are noting that under Monell v. Department of Social Services, (1978) a city can be sued in federal court for inadequate training of its officers, and that under Owen v. City of Independence (1980) the defense of good faith is no longer available to the government entity.

Schmidt, Section 1983 and the Changing Face of Police Management, in Police Leadership in America 235 (W. Geller ed. 1985)(hereinafter, Schmidt).

Literature in journals for police policymakers reveals a keen interest in preventing civil rights liability, particularly claims against municipalities and those based on deadly force claims. See, Schofield, "Law Enforcement and Government Liability, An Analysis of Recent Section 1983

Litigation," FBI Law Enforcement Bulletin, (January, 1981); Scuro, "Recent Developments in Government liability under 42 U.S.C. 1983," The Police Chief, 20 (April 1982); Fazo, "Use of Deadly Force," The Police Chief, 54 (August 1985), Geller, "15 Shooting Reduction Techniques: Controlling the Use of Deadly Force By and Against Police Officers," The Police Chief, 56 (August 1985).

Training for police administrators on issues involving use of deadly force and police supervision now take place regularly, sponsored by groups like Americans for Effective Law Enforcement, the Southwestern Law Enforcement Institute and the International Association of Chiefs of Police. See 37 Crim.Law.Rptr. 2460, 2408, 2356, 2316 and 2060 (1985). In recent years more

than 3,000 senior police officials have attended three day programs on police liability and many more have attended shorter programs. Schmidt, supra, 229. Twenty years ago police executives had little interest in this subject. Id.

Police departments increasingly employ risk managers and legal advisors "to minimize liability by the improvement of training, the re-examination of department policies, and the reassignment of officers who generate an abnormal number of complaints." Schmidt, supra, 232. While a definitive study of the effects of Monell has yet to be done, it seems that municipalities are the right defendants to achieve §1983's goal of deterrence. See, Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcement

Misconduct, 87 Yale L.J. 447, 455-458 (1978).

C. A City May Be Liable for Constitutional Violations Caused by its Gross Negligence in Training its Police Officers

Where a municipal policy or custom of inadequate police training is the moving force which causes a deprivation of constitutional rights, the municipality should be liable for the harm, as argued above. Amici would argue that this should be the result whether the city's policy was deliberately adopted or adopted through recklessness, gross negligence or simple negligence. Amici reject the argument that a high degree of culpability or fault on the part of the municipality need be shown, the question should simply be whether the city's own acts or omissions caused the

violation of constitutional rights which occurred.

This Court need not decide in this case, however, whether a negligently adopted policy may create liability under §1983. To the extent a trial court must demand proof of a degree of culpability on the part of the city, that was done here where a gross negligence instruction was given.

A showing of culpability or fault was suggested by the plurality in Tuttle to provide some limitation "on establishing municipal liability through policies that are not themselves unconstitutional." City of Oklahoma City v. Tuttle, 105 S.Ct. at 2436. The gross negligence standard establishes such a limit while also furthering the deterrent goal of Monell and Owen by providing an incentive for municipal

officials to take action to prevent foreseeable constitutional violations by municipal employees.

When a municipality has been grossly negligent in the area of police training, the deprivation of constitutional rights is not merely foreseeable, but inevitable. Given that police officers have the power to deprive citizens of their liberty, and exercise that power with implements capable of causing serious bodily harm and death, such constitutional violations will also be extremely serious. At the same time, it is easy for a municipality to avoid liability by exercising due care in these critical areas. A standard of culpability higher than gross negligence would tip the balance too far in the direction of immunizing municipalities for acts which

foreseeably lead to constitutional violations.[11/]

A majority of the circuit courts which have considered this issue have concluded that a city may be liable when its police training is grossly negligent so that future police conduct is substantially certain to result. Wierstak v. Heffernan, supra, Owens v. Haas, supra, Rymer v. Davis, 775 F.2d 756 (6th Cir. 1985); Herrera v. Valentine, supra; McClelland v. Facteau, supra.

The City of Springfield argues that municipal liability should only apply

---

11/ Amici for the City argue that gross negligence amounting to deliberate indifference should be the standard of liability. No rationale is provided to explain the significance of the additional language concerning deliberate indifference.

where city policymakers' conscious choice or deliberate conduct establishes a blatantly unconstitutional policy, citing the recent decision in Pembaur v. City of Cincinnati, 106 S.Ct. 1292 (1986). However, the requirements of an affirmative decision by a policymaker described in Pembaur do not apply to claims like those of plaintiff here based on municipal custom. Id. at 1299 n.10.

A City should not be liable under Monell for an isolated act of misconduct by an employee but, where the City has been grossly negligent in fulfilling its duty properly to train its employees so that a violation of constitutional rights is foreseeable, the City should be responsible. Imposing liability in this situation serves the deterrent purposes of Monell.

D. Tuttle Does Not Require Reversal Here.

This case is easily distinguishable from City of Oklahoma City v. Tuttle. Here, in contrast to Tuttle, the jury was instructed that "(a)n incident of excessive force on the part of the police officers standing by itself, is insufficient to find the City of Springfield liable under Section 1983." App. 234. Evidence regarding the training of police officers was introduced. Further, as noted by the Court of Appeals for the First Circuit, "this case involves at least ten officers and three separate shooting incidents, in which three different officers fired their weapons." Kibbe v. City of Springfield, 777 F.2d 801, 805 (1st Cir. 1985). Because the jury was properly instructed not to infer

municipal liability from a single incident of excessive force and the evidence permitted a finding of gross negligence in police training, Tuttle does not require reversal here. The jury's conclusion that the proof met the requisite standard is entitled to the greatest respect:

> In determining whether the evidence is sufficient (in support of a judgment) the court is not free to weigh the evidence or pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury.

Wright and Miller, Federal Practice and Procedure §2524, 543-544.

Evidence must be viewed most favorably to the party opposing a motion to set aside a verdict. Galloway v. United States, 319 U.S. 372 (1943). Even when reviewing findings of a judge this Court will not reverse simply because it would have decided the case

differently. Anderson v. City of Bessemer City, North Carolina, ___ U.S. ___, 105 S.Ct. 1504, 1511 (1985); City of Riverside v. Rivera, ___ U.S. ____, 54 U.S.L.W. 4843, 4851 (June 27, 1986)(Powell, J. concurring). A jury's verdict is given even greater deference than a decision of a judge. Wright and Miller, Federal Practice and Procedures §2585, 730.

CONCLUSION

For all the foregoing reasons, this petition for certiorari should be dismissed as having been improvidently granted. Should this Court reach the issues raised the judgment of the Court

of Appeals for the First Circuit should be affirmed.

Respectfully Submitted,

Howard Friedman
Michael Avery, Counsel of Record
Six Beacon St., Suite 520
Boston, MA 02108
(617) 357-2626

Marjorie Heins
Civil Liberties Union
of Massachusetts
47 Winter Street
Boston, MA 02108
(617) 482-3170

David Rudovsky
Kairys & Rudovsky
1425 Walnut Street
Philadelphia, PA 19102
(215) 972-0909

Jack D. Novik
American Civil Liberties Union
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

August 1, 1986